No. 4523

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JOSEPH E. MARRON and GEORGE BIRDSALL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JOSEPH GORHAM,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PATRICK KISSANE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME II.

(Pages 353 to 702, Inclusive.)

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4523

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JOSEPH E. MARRON and GEORGE BIRDSALL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JOSEPH GORHAM,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PATRICK KISSANE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME II.

(Pages 353 to 702, Inclusive.)

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

(Testimony of John J. Casey.)

Mr. GILLIS.—Q. Did he give you any reason as to why the police did not find anything on those searches?

Mr. O'CONNOR.—That is objected to on the ground it calls for a conclusion and opinion of the witness, and not proper redirect examination.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Furthermore, it is indefinite as to date, time and place.

The COURT.—I think the time has been fixed before, Mr. Smith.

Mr. GILLIS.—There is only one conversation connected with Birdsall.

The COURT.—That was fixed before.

A. No, he did not.

Mr. GILLIS.—Q. Did he tell you how many searches there were? A. No. [291]

Q. You did not inquire? A. No.

Mr. GILLIS.—That is all.

Mr. TAAFFE.—Government Exhibit 40 was exhibited by Mr. Gillis and was introduced in evidence and marked without any objection, and there was only a portion read by Mr. Gillis to the jury, and I would like the opportunity to read the whole paper to them. This is on the stationery of the Police Department of the City and County of San Francisco, Police District No. 5, Bush Street Station, San Francisco, March 3, 1924.

"Captain John J. Casey.

Sir: I respectfully report the following: Sus-

pected illegal liquor selling. Locations, business, names of proprietors, No. 1221 Polk Street, Restaurant, Louis Angelinich, Proprietor."

The COURT.—Is there anything on it except what was read that pertains to this place?

Mr. TAAFFE.—Not anything else with regard to this place, but in each instance the proprietor is marked down.

The COURT.—Mr. Gillis only read as to that one place. Does it refer to that place in any other part?

Mr. TAAFFE.—No, but it refers to these places.

The COURT.—That is, there are a number of bootlegging places, or charged bootlegging places mentioned.

Mr. TAAFFE.—One is a restaurant, and the supposition is it would not be.

Mr. GILLIS.—It is headed, "Illegal liquor selling."

The COURT.—It is headed, "Suspected illegal liquor selling."

Mr. TAAFFE.—Yes.

The COURT.—It is sufficient, Gentlemen, that it covers a number of other places besides 1249 Polk Street, and in each case the name of the proprietor is given.

Mr. TAAFFE.—The name of the person occupying the premises was put [292] down as proprietor. The word "proprietor" in the present case has a peculiar significance. That is all.

Whereupon, after the conclusion of testimony, the Government rested.

MOTIONS FOR DIRECTED VERDICT.

Mr. KELLY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against him a verdict of not guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe.

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAFFEE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the

record, the same motion as to the defendant Mahoney, upon similar grounds.

Motions are denied. [293]

down as proprietor. The word "proprietor" in the present case has a peculiar significance. That is all.

Whereupon, after the conclusion of testimony, the Government rested.

MOTIONS FOR DIRECTED VERDICT.

Mr. KELLEY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against Gorham a verdict of not guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe?

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAAFFE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the record, the same motion as to the defendant Mahoney, upon similar grounds.

MOTION FOR DIRECTED VERDICT ON BEHALF OF DEFENDANT KISSANE.

Mr. TAAFE.—May it please the Court, on behalf of the defendant Kissane, I now move the Court to direct the jury to return as to him a verdict of not guilty, upon the ground that the Government has not offered [294] sufficient evidence to submit the case to the jury as against him; in other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. The indictment by which these defendants are before the Court charges a conspiracy from about May 1, 1923, to the date of the filing of the indictment, which is October 17, 1924. The date of the consummation of the conspiracy is October 3d, 1924. Paragraph 35, found upon page 14, being the charging part of the indictment, charges that "George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gor-

ham, hereinafter called the defendants, did at the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California, within the jurisdiction of this Court, on or about the 1st day of May, 1923, the real and exact date being to said Grand Jurors unknown, and at all the time thereafter up to and including the date of the filing of this indictment, wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with diverse other persons whose names are to these grand jurors and to this grand jury unknown, to commit the acts made offenses and crimes against the United States of America, that is to say, that said defendants then and there being did then and there wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with diverse other persons whose names are to these grand jurors and to this grand jury unknown, with intent to and for the purpose of ". . . "did conspire to unlawfully possess liquor" "to unlawfully sell it," "conspire to unlawfully transport it," "conspire to unlawfully maintain a nuisance in connection with the liquor traffic at the places set forth in said indictment."

The indictment then charges as follows: "That in pursuance [295] of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with intent and for the purpose of effecting and accomplishing the objects thereof, said defendant Patrick Kissane then and there being

a regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, State of California, did on or about the 17th day of November, 1923, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, receive as such police officer, from said defendant George Birdsall, *alias* George Howard, the sum of Five ($5.00) dollars, lawful money of the United States."

There is not any other overt act charged in the indictment against Kissan*c,* save the one that I have just read. There is no evidence that said Kissane did confederate and agree and combine and conspire with the codefendants named to do the unlawful things charged in this indictment. The so-called "Gray Ledger," Government's Exhibit Number Three, was offered in evidence, objected to its introduction upon the grounds that as against Patrick Kissane it was incompetent, irrelevant and immaterial and that no foundation was laid for its introduction; and that there was nothing before the Court to show the unlawful conspiracy or confederation pleaded. There has been no evidence upon which the jury could find a sufficient connection between Patrick Kissane and the codefendants alleged to be in the conspiracy with him, to connect him up with anything happening at 1249 Polk Street, in any matter of a criminal nature. There is no evidence introduced that Patrick Kissane did wilfully, unlawfully, feloniously and knowingly or

otherwise, manufacture, sell, transport, deliver, furnish or have in his possession or that he knew that any of the defendants in said indictment named did wilfully, unlawfully, feloniously and knowingly manufacture, sell, transport, [296] deliver, furnish or have in their possession or that there was in the possession of each or any of them intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin or beer, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, in violation of Section Three of Title Two of the Act of October 28th, 1919, known as the National Prohibition Act. There is no evidence before the Court that said defendant Patrick Kissane entered into any conspiracy with any person or persons named in said indictment or otherwise or at all, to do or to effect or to aid or assist in doing any of the acts or any act mentioned and set forth in said indictment.

The COURT.—Motions are denied. [297]

Mr. KELLY.—May we note an exception on behalf of the defendant Gorham?

Mr. TAAFFE.—An exception on behalf of Kissane.

Mr. O'CONNOR.—Let the record show an exception in behalf of the defendant Mahoney.

Mr. SMITH.—Let the record show an exception on behalf of the defendants Marron and Birdsall.

The COURT.—Do you want an exception, Mr. Green.

Mr. GREEN.—No.

(Thereupon the jury returned into court.)

(Testimony of William Hill.)

The COURT.—I believe, Gentlemen, the rule requires a ruling to be made in the presence of the jury on these motions, also. The motions are denied.

Mr. KELLY.—I wish to note an exception in behalf of the defendant Gorham.

The COURT.—An exception may be noted on behalf of all the defendants.

TESTIMONY OF WILLIAM HILL, FOR DEFENDANT WALTER BRAND.

WILLIAM HILL, called on behalf of the defendant Brand, being first duly sworn testified as follows:

My name is William Hill and I live at 1520 California Street. My business is that of an embalmer. I am employed as such by the Golden Gate Undertaking Company and have been employed so for the last two and one-half years. I know the defendant, Walter Brand, who is employed at the Golden Gate Undertaking Company. To my knowledge he has been working there about eight or nine months. He first came to work there sometime in March of last year and was working there in September of last year. His hours of work were from 5:30 to 6 o'clock, sometimes it was seven o'clock, it depended on what kind of work he was doing. To my knowledge he never left before 5:39 and generally about 6. To my knowledge he worked right through September every day, including September 22d.

(Testimony of William Hill.)

I remember [298] the day of September 22d—he worked on that day and trimmed 3 or 4 caskets with me—that is, he helped me. I relieved him at 5:30 generally—I go to supper at 5 and he goes at 6 and comes back at 7:30. On September 22d he left about 6 o'clock and he has been working continuously for the Golden Gate Undertaking Company since March 24th and is working there now.

Cross-examination.

(By Mr. GILLIS.)

On September 22d, 1924, Walter Brand helped me trim 3 or 4 caskets—there is always something to do around an undertaking parlor. I do not particularly remember the day, but generally I do. I have not looked back in the book to determine about September 22d, but I know every day he has worked there—if he was not helping trim caskets he was helping to polish floors, but he was trimming caskets that day. Probably on August 22d he may have been on a funeral, or he may have been trimming caskets, or he may have been going after a body or something like that. I know that he worked on August 22d at the Golden Gate Undertaking Company. I have been with them continuously for the last two and one-half years. On August 22d I worked around the Undertaking Parlor—polished floors and things like that. I have a routine every day that I go through—sometimes trimming caskets—sometimes polishing floors—sometimes helping on funerals.

(Testimony of William Hill.)

Mr. Brand worked all of the day of September 22d, 1924. I do not know what salary Mr. Brand was drawing; I do not know whether he was drawing a salary or not. Besides myself there are employed by the Golden Gate Undertaking Company, Walter Brand, a bookkeeper and Mr. McCurdy. There is also the man and woman who own the firm. Brand sometimes worked for McCurdy, but we generally worked together. On the 22d of September, 1924, he worked with me—I think Mr. McCurdy was on a funeral. The books of the company do not show what we do there every day.

(Rep. Tr., pp. 268 to 273, inc.) [299]

TESTIMONY OF LOTTA McMILLAN, FOR DEFENDANT WALTER BRAND.

LOTTA McMILLAN, called on behalf of the defendant, Walter Brand, being first duly sworn testified as follows:

My name is Lotta McMillan; I live at 701 Sutter Street. I am employed at the Wakefield Hospital, 1065 Sutter Street in this city as Secretary. I have with me the official records of the Wakefield Hospital. The records of the Wakefield Hospital show that the defendant, Walter Brand entered the hospital Sunday, November 18th, 1923, and was discharged from the hospital on November 21st, 1923, and had received treatment during the time that he was there from November 18th to November 21st.

(Testimony of Lotta McMillan.)

Cross-examination.

(By Mr. GILLIS.)

I did not know Mr. Brand when he came in. The same name appearing on our records is the same name as the Walter Brand present here. He was confined in bed for three days while he was there.

(Rep. Tr., pp. 273 to 274.)

TESTIMONY OF LYDA LYDDANE, FOR DEFENDANT WALTER BRAND.

LYDA LYDDANE, a witness called on behalf of the defendant, Walter Brand, being first duly sworn, testified as follows:

My name is Lyda Lyddane and I reside at 1055 Pine Street in this city and county and am employed at the Morton Hospital, 1055 Pine Street in this city and county as assistant office manager. I have with me the official records of that hospital. They consist of a doctor's chart kept by the nurse and the admission card and financial record; they mention the name of Walter Brand and show that Walter Brand entered the Morton Hospital November 21, 1923, and that he left the hospital December 16, 1923. I assume that he was there during all of that time, because if he left the readmission would have been made, and the admission card here does not show any leaving or re-entering. [300]

(Testimony of Lyda Lyddane.)

Cross-examination.

(By Mr. GILLIS.)

I do not know Walter Brand nor did I know him at the time he was in the Morton Hospital.

(Rep. Tr., pp. 275, 276.)

TESTIMONY OF JAMES B. HUGHES, FOR DEFENDANT WALTER BRAND.

A witness called on behalf of the defendant, Walter Brand, being first duly sworn testified as follows:

My name is James B. Hughes and I reside at 3155 16th St. and I am a regularly licensed and practicing physician and surgeon in this city and county and have been such since 1895. I know the defendant, Walter Brand, and he has been a patient of mine. He became a patient of mine in the beginning of November or the latter part of October, 1923—consulted me at that time and I examined and found that he was suffering from a peculiar form of eczema of his hands. He afterwards received hospital attention under my care—first at the Wakefield Hospital where he stayed a few days and left and went to the Morton Hospital, where he remained until sometime in the middle of December. The treatment of this form of eczema required the application of an ointment, special diet and particularly refraining from the use of water on his hands. It was essential that he not immerse his hands in water in that condition. He would

(Testimony of James B. Hughes.)

not be able to wash his hands and I do not very well see how he could keep clean and tend bar. Brand was in bed until some time after the first of the year, 1924, and he was my patient for three or four months afterwards. I have known Walter Brand since 1918 and I know his general reputation in the community in which he lives for truth, honesty and integrity and his reputation are good.

Cross-examination.

(By Mr. GILLIS.)

I have known W. B. Brand since 1918. I do not know what he was doing then. He came under my care as a patient in 1918 because he had the flu. It was during the year of the big epidemic, so that [301] I definitely fix that as the time I first met him and made his acquaintance. The only way I have known Walter Brand is as a patient, and I do not know what his business was from the latter part of October or November, 1923, nor did he tell me what his business was. I know that he lived at 526 or 527 Faxon Avenue. I did not know that he had a place at 1249 Polk Street, nor did he say anything to me about it. His hands were in such a condition that he could not put them in water, he could not use them very well because they were in bad shape. He is the first bartender I ever saw with that form of eczema. It is not a form of eczema from which bartenders suffer a great deal.

(Rep. Tr., pp. 276 to 279.)

TESTIMONY OF WALTER BRAND, IN HIS OWN BEHALF.

WALTER BRAND, called as a witness on his own behalf, being first duly sworn, testified as follows:

My name is Walter Brand and I reside at 527 Faxon Avenue, in the city and county of San Francisco. I kept the premises at 1249 Polk Street in this city and first took possession of these premises on July 26, 1923. I obtained the premises from George Hawkins. Hawkins wanted to go away and a party told me he was not feeling well and wanted to get out of business—so I went to see him. At first he wanted $1500 for the place, but finally came down to $1000 and I bought the place. I have known the defendant Eddie Marron for several years and at the time I bought the place from him I owed him some money—approximately $325. After Hawkins agreed to sell the premises to me for $1000 I asked Marron to loan me the money and he agreed to do this. I then bought from Hawkins the furniture of the 5 rooms at the premises. The premises were not entirely furnished—I put in other furniture afterwards. I gave Hawkins a deposit of $500 which was the first loan I got from Marron and I paid the rest to Hawkins according to our agreement—about [302] 25 days afterwards. I entered on the occupancy of the premises July 26, 1923. I actually resided there and lived there. I had no one working for

(Testimony of Walter Brand.)

me at any time and I have no partner, but run the business independently and alone. I started to pay back to Marron when I was there a little over a month and I think the first I gave him back was $500. Marron used to come to see me once in a while when he would have a few drinks—he would ask me how I was getting along and I would tell him how I was doing, and he asked me what I was doing with the money and I told him I was getting it accumulated every day and he told me to put it in a bank. I told him I did not want to do it. He then told me that he wanted me to put the money in the bank and we had a little wrangle over it, and the next day he came up and said to put it in the bank and any time I wanted any money he would sign a check and if I wanted to pay him any money I would have to do the same thing, but he wanted to account for all the money that was taken in. Subsequent to this I opened a bank account at the Polk Street Branch of the Bank of Italy. During the time I was operating the premises in question defendant Marron never received any profits from the business and received no money except payments on the balance due him, and I would make payments on the $325 that I previously owed him. I do not owe him any money now. During the time, I was occupying the premises, I was selling liquor in violation of the prohibition act.

I had nothing to do with the place in October, 1923. Marron came around there and told me that

(Testimony of Walter Brand.)

I was working alone and he saw the business was doing good, and said he thought he would put Birdsall up there with me and asked me if I knew the man. I told him, no. That night he said, "I think I will put him up here and take the place." That afternoon he brought up a register and I said, "You can take the place." I then asked him to give me the money [303] that was in the bank and he said he would as soon as he saw Farrell, the man who used to make up my books for me. Mr. Farrell was an expert accountant at the Fair of 1915. After this took place I stayed there that night and when I got up in the morning I saw Mr. Birdsall there. Marron then came up and I asked him when he was going to give me the money in the bank and I told him I would see Farrell, and I did get a hold of Farrell that afternoon, but could not find Marron. I then made an engagement with Farrell to be there the next day at three o'clock in the afternoon, and also asked Marron to be there. Farrell was there, but Marron was not. I made an engagement for the next day and was unable to get them there together. I then asked Birdsall to tell Marron that I wanted to see him a few days later at two o'clock because I had an engagement with Farrell, but that meeting did not materialize. It seemed that I could not get them together for about ten or fifteen days —when I finally got them together and we arranged a settlement. In that settlement Marron was paid in full—everything I owed him. We

(Testimony of Walter Brand.)

then settled up the bank account—he gave me my money from the bank and I sold him the ice-box, table, chairs and cuspidors. That was sometime in October or before the first of November, 1923. I then stayed around there a few days, usually being there for about a half hour or so. I wanted to see some people who owed me money, but had nothing to do with the business from that time on, and never served any drinks thereafter. I believe from the settlement I got approximately $125 to $135—the last payment made was one of $25.

Shortly after that, I believe around the middle of October, I went to see Dr. Hughes and he subsequently sent me to the hospital. I first went to the Wakefield Hospital and after being there a few days I went in an ambulance to the Morton Hospital. After I was discharged I went home and went to bed and stayed there a [304] little over a month, which would bring me up to the latter part of January. Then, for a few weeks I was unable to do anything—and could not. After I was able to go out I went to the Golden Gate Undertaking Company where I subsequently obtained employment. Part of my work was to go to the Health Department, put death notices in the paper and go to the coroner's office, and such as that. I never had any cases for two months. I did errands for them. At that time I still felt the effects of my illness. I never participated in the undertaking work of that firm. Trimming caskets and going after cases to the hospital, etc., were

(Testimony of Walter Brand.)

my duties. I was not on the pay-roll of the Golden Gate Undertaking Company, but as compensation I sometimes received $75 or $80, according to how business was. I have been with the Golden Gate Undertaking Company a little over 8 months and I have received from them in all, approximately $400. I am not an embalmer, but am in the apprenticeship as such, and I am still connected with the firm in that capacity. I heard Agent Howard testify here. I never sold any drinks at 1249 Polk Street to Agent Howard on the 22d day of September, 1924, or at any other time, nor was I near 1249 Polk Street on the 22d of September, 1924, and had not been at that place for about a year. I heard the witness Herring testify here—I did not sell witness Herring any drinks at 1249 Polk Street from the 13th of November to the end of November. At that time I was under the doctor's care and from the 16th of November on I was in the hospital. I did not sell the witness Bivens drinks in July, August and September, 1923. I recognize Exhibit 3 of the Government, the book that is now shown me. I had that book in my possession until October of 1923. I made a statement following my arrest to someone in Mr. Oftedal's office, and the statement I made regarding the book is true. I ceased to keep the book in question on the 17th day of October, which is shown at page 29 in the book. The book prior to page 29 was kept by me. When I finished [305] with the book I threw it in the closet in the premises at

(Testimony of Walter Brand.)

1249 Polk Street and did not see it again until it was shown to me in Mr. Oftedal's office. The sums of money I repaid to Mr. Marron on the loans he made me are entered in the book, they are not in my handwriting, but Mr. Farrell put them in there—they are in his handwriting. I made the deposits in the bank account that I have testified to and the last deposit is shown on the statement. I believe it was the one of $107.55 of October 20th. I had nothing to do with the bank account after that date.

Cross-examination.

(By Mr. GILLIS.)

Before I borrowed the $1,000 from Marron I borrowed also $325. The first $500 of the thousand dollar loan that I borrowed of Marron I borrowed on or about July 26, and the other $500 I borrowed sometime during the month, when, I don't exactly know—that would be during the month of August I believe, making a little over $1300 I owed Marron. I do not remember exactly when I paid back the first $500, it must have been in August some time around the time I paid him back this money as Marron would come up to the place once in a while. I did not owe Marron any other money than the $1,300. I did not become indebted to him at that time in any other way. Marron seemed insistent that he get his money and would come and ask me when I was going to pay it. I never made any arrangements with him when I would pay it back, what the money was originally borrowed for,

(Testimony of Walter Brand.)

nor did I tell him what I was going to use it for, and he never asked me what I was going to use it for. I told him I was going to get a place on Polk Street, but not what kind of a place and asked him to come and see me. I was only up there four or five days when he insisted upon my opening a joint bank account. That was in the first part of August. I think that the account was opened sometime in September. He knew the kind of business I was running afterwards because he came up there and bought a few drinks from me. It was [306] around the first of August that he advanced the second $500. This I used to buy stock. Mr. Marron knew all about the kind of a place I was running after I was up there—that was at the time I got the second $500. I guess he knew what I wanted the second $500 for. The second $500 was advanced to make up the original $1,000 loan. I had no talk with him at all when he gave me the second $500—I never discussed stock with Marron and he never said a word about liquor to me, nor, did he state that he would like to sell me some liquor, and I never did buy any liquor from him. I bought the liquor I used from two different persons. I bought it from a man by the name of Carpenter—I didn't know where he lived, but I had his telephone number and when I wanted anything I telephoned him. I got different kinds of liquor from him—Scotch, Bourbon. Marron would probably come to the place about twice a week after the bank account was opened—he would

(Testimony of Walter Brand.)

ask me how I was doing and have a few drinks. I always told him I was doing all right. It was about the first of October when he first broached the subject of taking over the business from me. He told me he wanted to put someone to work there, a man named Birdsall, and he was going to give him charge of the place, and I told him, "All right, he could have it." I made no objections to him putting somebody to work there, because I wanted to get out of the business. It was perfectly agreeable to me if he would put someone else there and give me my money, and let me get out. I think it was approximately October 17th when Birdsall first came there. The next morning after Birdsall arrived I quit and I have never had anything more to do with the place since that time. Marron said he was paying Birdsall, but I never paid Birdsall anything. Birdsall may have taken money out of the business that was being run there. I had nothing to do with it if he did. I never made any complaint about what Birdsall took from the business, I did not know what he was taking, nor did I look at the register, [307] nor did I know what Birdsall was getting. I seldom saw Marron after that, but I tried to get Marron to settle up my account, and is the reason I could not get Marron for 15 days or 16 days. I was up there once a day until that time. After the bookkeeper came and made up the books, and gave Birdsall $20 a day, I told him I could not afford to pay out that money, that was, to be taken out of the money I

(Testimony of Walter Brand.)

had taken in. I did not turn the bank account and the business over to Birdsall the minute he came in—I was waiting for the bookkeeper to come and make up the books. I turned everything over to Marron—stock and everything. I never bought any stock from the time that Birdsall came up there. There must have been more stock put in to run the business, but as to this I could not say. I think I got approximately $82 or $84 for my chairs and tables—that included all the furniture I had in the place. There was a stove in the kitchen when I was there. When we had the division we went to the bank and took the money out of the bank and I got all the money there was in the bank—I think it was approximately $104.06—this amount I kept and that is all that Marron gave me.

Referring to the book on page 20 thereof—the item of the 6th—"Bank of Italy—Walter $150"—scratched off represents money that I took. The item on the 14th—$89.60 and the item Walter $40, and the item Walter Mrs. B. $50 and the item Walter $50; that money is money I drew; the $89.60 is money I was paying on a sedan; the items on page 21 of August 31 marked "Balance after payment of business E. Marron $500 rent $100, W. Brand $500,"—those are items as follows: Paid Marron on account of the $1000 loan and I paid my rent $100, and $500 I took myself and transferred it to where I had the other amount. That was a personal account I drew during the month. On page 31, October 31, "W. Brand $408.99 and E. Marron $603.08,

(Testimony of Walter Brand.)

I can't tell you what exactly that [308] is—it is in the bookkeeper's writing—I know I gave Marron $600 at one time—that is in addition to the $500 that I testified I paid him. Sometime afterwards I gave him $50—that was during the month of September. I gave him $50 in October and later in October settled up the bank account. I have paid him back everything out of the profits of the business that I have conducted. I can't definitely fix the third payment to Marron in the book. I don't think it is in the book.

(Rep. Tr., pp. 283 to 303, inc.)

TESTIMONY OF JULIAN R. BRANDON, FOR DEFENDANT PATRICK KISSANE.

JULIAN R. BRANDON, a witness called on behalf of the defendant Kissane, being first duly sworn, *de*testified as follows:

My name is Julian R. Brandon and I reside at 2529 Polk Street in the city of San Francisco. I am by profession a physician and have practiced for a number of years. I know the defendant Patrick Kissane and have known him between 16 and 18 years. His general reputation in the community in which he resides for truth, honesty and intelligence, and his reputation are very good.

TESTIMONY OF WALTER BRAND, IN HIS OWN BEHALF (RECALLED—CROSS-EXAMINATION).

Cross-examination of WALTER BRAND (Resumed.)

The $50 payments I referred to were not put in the bank—one $50 payment was and the other was not. It was my practice to put in the book just part of the money I had paid back to Marron on the loan—what I mean is, is that the amounts were put in the book by Mr. Farrell, the accountant, and he would add up and audit the book. Mr. Farrell puts the amounts in the book at my request. I did not put the $500 that I paid Marron in the book—I told Farrell to put it in the book. Mr. Farrell made the figures and entries of the pay-roll at page 31 at my request. The figures 8¢ and 3¢ appearing therein I don't know where he got those. I took money myself a lot of times I did not put down. [309]

Some of the money that I paid Marron I did not put down. I did not sell any drinks to Herring on November 13th, or thereafter. I could not say positively whether I waited on him before the 13th. I know who Mr. Herring is; he had a bakery right on the corner from me—I do not believe that he was in my place before November 13th, but I am not positive. He did not come to my place as far as I remember when I was there. I don't remember him. It is hard to say how many people I would serve a day—a lot of people had keys to go up to the place and help themselves and lay the money down when

(Testimony of Walter Brand.)

I was not there. I kept the liquor in the closet. Sometimes I would lock it—none of my customers had keys to the closet. I could not tell how many people came in there in a day—it may have been 20 or 30—maybe more. In the evening, maybe 10 or 12. I had a little crowd of people coming in and out all the time. I never made much money there myself, I paid the borrowed money out of the business. I charged 50¢ for drinks, either Scotch or Bourbon, and sometimes I made highballs. I lived at 1249 Polk Street all the time I was there, but I had another residence at my home, 527 *Gaxon* Avenue, where my wife resides. I did not figure 1249 Polk Street as my home, but would stay there when I could not get a car home at night-time. I generally kept open until twelve and one o'clock, sometimes I stayed until two thirty and took the last car home. I seldom kept open after two thirty.

Redirect Examination.

(By Mr. GREEN.)

I was kept pretty busy at 1249 Polk Street, because I did all the work myself. When the settlement was made with Marron, Farrell attended to it and made the settlement. I left everything to him. All the money I had borrowed from Marron was taken care of at this settlement, and the entries in the book of moneys paid to Marron were made by Mr. Farrell. At the time Marron was going [310] to take the place over and put Birdsall there to run it, I was not very well physically, nor was

(Testimony of Walter Brand.)

I in any condition to fight with Marron about anything—all I wanted was to get out; I just wanted to square up my debts and move out, and I never went back. Neither Marron or Birdsall, nor Mahoney, nor any other defendant in this case was ever a partner of mine. I was an independent bootlegger. I got my liquor in in the evening through the front door, that is, the entrance on Polk Street—that was the only entrance to the place. There was a street light on the corner about 30 or 35 feet away—an ordinary lamp-post. I do not know how many times a week deliveries of liquor were made; I did not keep very much stock on hand, and I would get it just as I needed it. Sometimes it would be three times a week and they were usually made around eight or nine o'clock at night. The liquor would be delivered or brought up in suitcases.

I did not quit the business because Birdsall was going to be paid $20 a day; I did not care how much Birdsall was getting—I wanted to get out of the business. Anybody could have had the business that wanted it. In accordance with the statement at the time of my arrest, I did ask Marron about paying Birdsall $20 a day—he told me he was going to give him $20 a day, and I didn't care what he gave him, but I didn't think he was going to take it out of my money. I thought it was too much to give him. Marron intended to take it out of my receipts. I did not find out that Birdsall was going to get any salary until Farrall told me that Marron was paying him $20 a day. I quit the

(Testimony of Walter Brand.)
place the next morning after Marron told me he was going to put Birdsall in charge, and that was the first time he had mentioned taking over the place. [311]

TESTIMONY OF PATRICK KISSANE, IN HIS OWN BEHALF.

PATRICK KISSANE, a witness called in his own behalf, and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

Mr. TAAFFE.—Mr. Gillis, will it be stipulated that this book which was introduced in evidence and marked Government's Exhibit 3 has been in the hands of the Government officials since the 2d of October, 1924?

Mr. GILLIS.—What is the purpose of the stipulation?

Mr. TAAFFE.—Do you wish to so stipulate?

Mr. GILLIS.—I want to know the purpose of your stipulation. If it is to throw some insinuation against Government officials, I do not know that I want to stipulate as to anything—if that is the purpose of the stipulation—if it is not, if you make it known to the Court, maybe we can agree.

Mr. TAAFFE.—The purpose of the stipulation is this, that there has been a change in this book.

The COURT.—You mean a change as between "Police" and "Policy"?

Mr. TAAFFE.—Yes, and it was for the purpose

(Testimony of Patrick Kissane.)

of ascertaining whether or not the Government was going to charge that change as against these defendants, or not.

The COURT.—I think the stipulation is proper, in view of that.

Mr. GILLIS.—If that is all you want the stipulation for, it is perfectly agreeable to me.

Mr. TAAFFE.—Then it is stipulated that this book, Government Exhibit 3, has been in the hands of the Government officials, or under the control of the Government, at any rate, since the raid on the 2d of October, 1924?

Mr. GILLIS.—That is correct. [312]

Mr. TAAFFE.—That is all I want.

The WITNESS.—My name is Patrick Kissane. I reside at 130 21st Avenue. I am a police officer, under suspension. I have been a police officer, actually engaged as such, prior to my suspension, for 27 years. During that period of time I was engaged as a police officer in the City and County of San Francisco continuously. During that period I have acted under different captains in different sections of the city. On the 3d of October, 1924, I was assigned to the Bush Street Station, District No. 5. Prior to this assignment I had been there about 18 years. I had particular streets or beats designated that I was to cover on that assignment. I was assigned to Polk and Larkin from Sutter to Broadway. It would be about approximately 18 blocks, nine blocks to each street. I had to patrol the boat, and I had to do

(Testimony of Patrick Kissane.)

the crossing duty at the schools for about three or four hours of the day. My watch was from 8 in the morning—8 A. M. to 4 P. M.; 8 hours. I had what is designated as the day watch. The watches are split up in eight hours, making three squads in 24, patrolling that beat. I went on at eight o'clock in the morning ready for duty. My activities from thence on until 8 o'clock under this assignment were that I went on the street—my first duties were to attend to the schools from half-past eight to half-past nine, and then I did other work until half-past two. From 12 until one I was also on a crossing for the safety of school children crossing the street, and then again at half-past two to half-past three I was on a crossing. My assignment was for eight hours on those 18 blocks. I was to patrol those eighteen blocks in addition to that detail, with the exception of Saturdays, I was at the crossing or in front of the school for the protection of children at the crossing [313] of Pine and Polk Streets from 8 to 9, and from 12 to 1, from half-past 2 to half-past 3. There were three hours of my assignment of eight that I had to patrol the streets of 18 blocks in which I was stationed at a particular place. We also had to make investigations on burglary reports, robberies, and various other duties we had to attend to. There are many places of business on blocks that were assigned to me. Polk Street from Sutter to Broadway is all stores almost. There are other places than general stores; there are garages; we

(Testimony of Patrick Kissane.)

have banks there, and machine-shops. Under my assignment it was necessary to visit these garages and machine-shops. We had to be on watch for lost or stolen machines, to get a report from the owner of the garage. It would consume some time at intervals for the purpose of looking over machines that were in the garage at those particular institutions. For the purpose of doing other work that was assigned to me, it was necessary for me to accomplish it all in a period of five hours, because there were three hours in it in which I had to attend to school children. If there were any investigations to be made they were to come out of the five hours of service on the streets. Most of the time I was assigned from—well, it was a detail from Sutter to Market—the regular man on there used to, as we used to call it, be floating, where he would take in other beats, be detailed on other beats, and I used to take in the full length of Polk and Larkin, from Broadway to Market. It embraced a greater expanse than between Sutter and Broadway. I would have to patrol the beat. I would walk down one street and back the other. I was supposed to keep moving all the time, unless something attracted my attention, and if anything turned up I would have to stop, but in the event that nothing turned up I would keep patrolling. I would have the detail probably three or four times [314] a week, to cover the beat from Sutter to Market Street, on Polk and Larkin. I patrolled the full length from Broadway to Mar-

(Testimony of Patrick Kissane.)

ket Street myself. My regular beat was Sutter Street to Broadway, but sometimes when the regular officer was away, I would also cover, in addition to covering his regular beat, the beat from Sutter to Market Street. If anything unusual happened upon my beat, I was supposed, under my instructions, to render a report to my superior officer. During the time that I was assigned to this beat from what is called the Bush Street Station, designated as Station No. 5, I was requested to visit the premises at 1249 Polk Street. I am familiar with those premises, and I visited them. On my visits to these premises I did have a conversation with one of the defendants that is here present in court. I had a conversation with George Birdsall. I saw Mahoney and Marron. I didn't see much of Marron. I never received money from George Birdsall, one of the defendants, on the 17th day of November, 1923, or at any other time, or at all, or from anyone else connected with that place, 1249 Polk Street. I didn't know on the 17th day of November, or any other time, that liquor was being sold on those premises. I didn't ever see anyone drinking liquor upon those premises. I didn't ever see any liquor upon those premises. I didn't, during my patroling of my beat, on the streets, at 1249 Polk Street, in this city and county, see anyone go into these premises with any liquor. I never at any time procured any person or aided or assisted anyone to bring into those premises any intoxicating liquor, or any li-

(Testimony of Patrick Kissane.)

quor of any kind or character. I have never by any act aided or assisted George Hawkins in violating the Prohibition Act at 1249 Polk Street, this city. I have never aided or assisted or conspired with Walter Brand to violate the Prohibition Act, or protected Hawkins or Brand in the [315] violation of the act. I never rendered to them any protection of any kind or character. I never aided or assisted Marron—Joseph E. Marron, *alias* Eddie Marron, to violate the Prohibition Act, or any act whatsoever, or any law, at the premises. I never aided or assisted George Birdsall either. After I made an investigation at those places I would leave there. I would not make any report to anyone with reference to the places, not all of the time. On some occasions I have rendered a report. Those reports are written reports. They were rendeed to my captain. I heard the reports read in evidence yesterday with reference to my visits to those premises. (The attention of the witness was then directed to Government Exhibit 34.) I have seen that report before. It is in my handwriting, and signed by me on the 11th of October, the date it bears. In addition to this report, Government's Exhibit 34, I rendered other reports to my captain with reference to the activities at this place. They were rendered under circumstances similar to the circumstances that caused the rendering of those other reports. On the 17th day of November, 1923, I did not receive from any one of the defendants in this action the

(Testimony of Patrick Kissane.)

sum of $5, or from any person at 1249 Polk Street. (The attention of the witness was then directed to a paper designated as a list.) I never at any time or on any occasion, as indicated on this paper, which is a copy from the gray ledger, receive from George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, Charles Mahoney, or any person or persons, in any manner, shape or form, or from any person in connection with these premises at 1249 Polk Street, any moneys for any purpose whatsoever. I never saw, while patrolling this beat, and while in the neighborhood of 1249 Polk Street, a crowd or congregation there going into or coming out of those premises. [316] I have not at any time at those premises seen any deliveries of any kind or character being made. My duties as a police officer did not call me to Polk Street, and especially to 1249 Polk Street, at any other time of the day or night other than the assignment from eight o'clock in the morning until four o'clock in the afternoon. Sometimes there might be wagons standing in front of 1249 Polk Street during the time that I was patrolling my beat. I could not say what character of wagons they were from what I observed. I never noticed what they were, but there were wagons in front of there, of course, and machines. I did not at any time see any delivery from the wagons or automobiles that were then in front of these premises, into these premises. On each occasion that

(Testimony of Patrick Kissane.)

a request was made to me, I visited the premises, and was admitted. The door leading up to the flat at 1249 Polk Street is just as you step off the sidewalk—the door is right on the sidewalk, you step up just one step, and in order to gain entrance you have to ring a bell. And, of course, you have to stand until you are admitted, one minute, or two minutes, or three minutes, probably longer. Then you go up a flight of stairs, up to the flat proper. It was not a glass door. It is opened by the man standing up at the head of the stairs, by a lever. I never counted how many steps it would be necessary for me to ascend before I would be on the second floor. I never counted them. It is pretty high up, a long flight of stairs, a second story flat. Upon the occasion of my visits to these premises, I was in the uniform of a police officer.

(R. Tr. Vol. —, pp. 312–323, inc.) [317]

TESTIMONY OF HARRY BERNSTEIN, FOR THE DEFENDANT PATRICK KISSANE.

HARRY BERNSTEIN, a witness called for the defendant Kissane, and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is Harry Bernstein. I reside at 1505 Gough Street. My occupation is proprietor of a furnishing goods store at 1254 Polk Street. I have been in business about twelve years at that cor-

(Testimony of Harry Bernstein.)

ner. I know the defendant Patrick Kissane and have known him for a period of twelve years, during which time I have come in contact with and have seen him frequently, and I am prepared to testify as to his general reputation in the community in which he resides for truth, honesty and integrity. To my knowledge it has never been known otherwise to me than good.

(R. Tr., p. 324.)

TESTIMONY OF FRANK W. LUCIER, FOR THE DEFENDANT PATRICK KISSANE.

FRANK W. LUCIER, a witness called for the fendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is Frank W. Lucier. I reside at 930 Judah Street, San Francisco. My occupation is that of a shoe dealer. My business is located at 1323 Polk Street. I have been engaged in business at that location for four years. Previous thereto I had been engaged in a similar business at 151 Post Street. I know the defendant in this case, Mr. Patrick Kissane, very well and have known him for about twenty-five years. During that time I have come in contact with him frequently and I have seen him frequently and I am prepared to state of my own knowledge what his general reputation in the community in which he

(Testimony of William K. Latham.)
resides is for truth, honesty and integrity, [318]
and I would say that it was very good.

(R. Tr., p. 325.)

TESTIMONY OF WILLIAM K. LATHAM, FOR THE DEFENDANT PATRICK KISSANE.

WILLIAM K. LATHAM, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is William K. Latham. I live at 1487 Pine Street, San Francisco. My business is stationery and book business at 1515 Polk Street. I have been in that particular location for fifteen years, during which time I should judge I have known Patrick Kissane for fourteen years. During that period I have seen him frequently and came in contact with him, and from my observation I am prepared to say what his general reputation is in the community in which he resides for truth, honesty and integrity. Of my own knowledge I know that his reputation for truth, honesty and integrity is good.

Cross-examination.

(By Mr. GILLIS.)

Mr. GILLIS.—Q. Did you ever visit 1249 Polk Street?

Mr. SMITH.—That is objected to.

(Testimony of William K. Latham.)

The WITNESS.—Your Honor, I did not come here to testify to that.

The COURT.—I do not think that has anything to do with Mr. Kissane's reputation.

Mr. GILLIS.—A matter of interest, may it please the Court, it may develop that this man has seen some one of the defendants in [319] there.

The COURT.—I will permit you to ask him whether he ever saw Mr. Kissane there, but I do not think farther than that you ought to go.

Mr. GILLIS.—It seems to me that if the defendant has produced this witness here, who is here as a character witness to testify as to the good character of one of the defendants, who is accused of going into that place, which the prosecution is endeavoring to show was a bootlegging place, that certainly would have weight upon the testimony of this individual, in establishing the character of the particular defendant.

The COURT.—I will sustain the objection.

Mr. TAAFFE.—We might apply the same rule to Mr. Gillis—

The COURT.—I have sustained the objection, Mr. Taaffe.

Mr. GILLIS.—Q. Have you ever seen Mr. Kissane in there? A. No, sir, I never did.

Mr. GILLIS.—That is all.

(R. Tr., pp. 325–327.)

TESTIMONY OF T. C. PRIOR, FOR THE DEFENDANT PATRICK KISSANE.

T. C. PRIOR, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is T. C. Prior. I reside at 1326 Larkin Street and by occupation I am superintendent of the Olympic Salt Water Company and have been so engaged for a period of sixteen years. I have known Patrick Kissane, the defendant, for a long period of time—about twenty-five years, during which period I have seen him very frequently [320] and I am prepared from my observation of him to say what his general reputation is in this community for truth, honesty and integrity, which is very good.

(R. Tr., p. 327.)

TESTIMONY OF DAVID BIRNBAUM, FOR THE DEFENDANT PATRICK KISSANE.

DAVID BIRNBAUM, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is David Birnbaum. I reside at 1246 Ninth Avenue, San Francisco. My occupation is that of a marketman. I have two markets, one

(Testimony of David Birnbaum.)

at 1236 Polk Street and one at 1726 Polk Street. I have been in the market business all my life, San Francisco about thirty years. I know the defendant Patrick Kissane and have known him for twenty years, during which period I have seen him frequently and I am prepared to say what his general reputation is in the community in which he resides for truth, honesty and integrity, which is very good.

(R. Tr., p. 328.).

TESTIMONY OF WILLIAM BEAUBIEN, FOR THE DEFENDANT PATRICK KISSANE.

WILLIAM BEAUBIEN, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is William Beaubien. I live at 1716 Polk Street, [321] San Francisco. My occupation is that of a cigar and tobacco dealer. I have been engaged in that business in that particular place two years, which particular place is 1331 Polk Street, and I know the defendant in this case, Patrick Kissane, very well. I have known him at least eleven or twelve years, during which time I have seen him frequently, and I am prepared to say what his general reputation is in this community for truth, honesty and integrity, which is very good.

(R. Tr., pp. 328–329.)

TESTIMONY OF PATRICK KISSANE, IN HIS OWN BEHALF (RESUMED).

Direct Examination.

(By Mr. TAAFFE.)

I reside at 130 21st Avenue with my wife and daughter. In the course of my duties as a patrolman on the beat assigned to me it is necessary for me to call upon several business houses. In addition to calling upon the business houses and the time for remaining at crossings for the protection of school children, I had to call into the police station at times, and in addition I rang in to the police station every two hours from a box at Polk and Sacramento Streets. I did these things under orders from my superior. The reason I would sometimes call in personally to the station or ring in from a box was that if the regular men on the inside were in court or on some special business detailed somewhere, I would go in and take their place at the station until they would come back. When I would ring into the station, I would be told to come into the station. When that happened, I would be off the street then sometimes for an hour, sometimes [322] two hours. The person on duty in the station would go with the patrol wagon to whatever locality it would be called, and if a fire broke out in the district the patrol wagon had to respond to the fire, together with the station keeper. It was then my duty to take the place of the man detailed on the patrol

(Testimony of Patrick Kissane.)

wagon. The station keeper is the commanding officer. He is not a regular police officer. A lieutenant is in charge of the station. On the day watch there is a sergeant acting as lieutenant, and we take our orders from him. He gets his orders from the captain. The man doing station duty would accompany the patrol wagon and would be gone probably the length of time that the patrol wagon would be gone at a fire or accident.

Cross-examination.

(By Mr. GILLIS.)

The first time I ever saw Mr. Marron in this case was some time around June or July of 1923, I am not sure about the date, and I have known him since that time. I first met Mr. Birdsall after I met Mr. Marron in 1923. I met him at 1249 Polk Street. Prior to that time I just knew about him. That was all. I knew who he was. I would not say I knew where he worked. I knew what his business was, but I didn't really know where he worked. I have known Mr. Mahoney not very long. I don't think I ever spoke to him when he came on the street. I have known him since shortly after the time I met Marron and Birdsall. There was not much difference as to time. I know Mr. Brand. I met him at 1249 Polk Street. It was just about the time, a little before Marron came along, not very long, some time in the fall of 1923. I met Mr. Brand up at 1249 Polk Street, inside, at the head of the stairs. I rang the bell

(Testimony of Patrick Kissane.)

and went in. I would not be admitted without ringing the bell. I went inside and upstairs. I could not say that I introduced myself to Mr. Brand. I don't know exactly what [323] was said. It is a long time ago. But I probably asked him what his business was and what he was doing; I asked him, I believe, if he was bootlegging and he denied that he was bootlegging. This conversation took place at the head of the stairs. I think I asked him if he was living there, and I really couldn't tell you what he told me. This conversation took place in 1923, but I would not know what date or what month it was. It was maybe around July or August, I could not be sure about it. I didn't keep any dates on those fellows when I met them. The first time I went into 1249 Polk Street there were other people living there. It was a flat. They were living there when I went in there. It was a regular home. There was not any business in there. The man that owned the American Florist was there for years and there was not any indication of any business then. There was no suspicion of bootlegging there at all. The first suspicion of bootlegging that I had was when Hawkins was there. I made a report to that effect, that it was suspected as a bootlegging place. When Brand came there I still had that suspicion that it was a bootlegging joint. That was one of the things that induced me to go in when Brand was there, to see. I went in there to make such visits then. The first time I went in and saw Brand I didn't

(Testimony of Patrick Kissane.)

think that I had ever met him before. I didn't meet him before he was there. I asked him what kind of business he was doing there. I asked him, and he denied it, of course. He didn't say he was doing any business there at all. I would not be sure what he said about living there. That is quite a long while ago. I can't recall the words, what the conversation was, but I know that I must have asked him if he was bootlegging. He did not take me into any of the rooms to look around the flat. I walked around myself. I don't know whether I went into the front room or whether he took me. I don't know anything, because that is too long ago. I may have walked in the rooms, and I may not,—the [324] chances are I did walk around. I would not say whether I went through all the rooms. I really don't know how long it was after that I first met Brand. I could not really tell. I could not tell whether it was the same week or the next week, and I would not say it would be a month, but I kinda think, if I remember right, Marron was around there shortly after that time. I would not say, I really don't know, whether Brand lived there or not. As to my conclusion whether he lived there or whether he was conducting a business there, I will say I suspected he was bootlegging there, and I went away with that suspicion, and I had that suspicion when I went back the next time. I did not see anybody else there the first time besides Brand. Before I saw Brand I saw Hawkins there. When

(Testimony of Patrick Kissane.)

I first met Brand I saw nobody else there. I don't think so. I could not tell what time of day it was that I first went in. It would be on my regular watch. My watch is from 8 to 4, and I was continuously on that watch during 1923 and 1924 except when I was away on my vacation or I was sick. When I was on duty I was always on the day watch. I first met Marron in there, and I did not know him before I met him at 1249 Polk Street. I believe that Brand was there at that time. I do not know whether Brand introduced me to Marron, I could not tell you, and I do not know whether I had a talk with him the first time or not. I think I first met Marron at the head of the stairs. He might have been the man that pulled the lever that opened the door to admit me. I would not be sure about it. I think I met Brand and Marron together at the head of the stairs, but I would not be sure about it now. I do not think I had a conversation with the two of them. I think I asked Marron at that time what his business was, if he was bootlegging, and he denied it, and then I had not seen Marron for quite a while after that. Marron was never around. Marron denied he was bootlegging there, and I believe he said he was [325] connected with that place. I would not be sure about what he said about running some kind of a business there. I don't think he said he lived there. Really I don't know what he said, whether he offered any excuse as to why he was there. That

(Testimony of Patrick Kissane.)

is too long ago to go back and think what was said at that time. I suspected it was bootlegging, and when I went in I asked them if it was a bootlegging joint. I asked him if he was bootlegging. He denied that he was bootlegging. I asked him if he was living there, and I believe he said he was, or somebody lived there, I don't know. Brand said he was living there. I probably thought the two men were living there. I don't really know. I believe I walked around the rooms. I went through different rooms to see that everything was all right, and everything looked all right. There was no evidence of anything that I could see. I did not see anybody else in there. I did not see any evidence of any violation of the law there. There was no evidence of any liquor there at all. I did go into the kitchen. I don't know if I really did go into the kitchen, I would not be sure about that. I was looking around and I probably did go into the kitchen and out into the back porch. The next time I went in there after I met Marron with Brand might have been in the next week. I would not be sure about it. At that time I did not go into the place twice a week. I did not go in so often. I started going in twice a week probably way over a year or more ago, about a year from last October. It was probably in the neighborhood of October or November of 1923 when I started going in there twice a week. When I started to make these visits twice a week, I saw George Birdsall.

(Testimony of Patrick Kissane.)

It might have been in October when I first saw Birdsall. I could not tell you the month,—it may have been October. I am not sure about the date. The best way to get close to that would be to have my reports that I made. The report I made was October 11, 1924, and in [326] that report I said I had been going in there twice a week for over a year, and that would throw it back around October, 1923, that I started going in there twice a week. I figure it out that way. I first met Birdsall in October or November of 1923. It might have been longer than that, I don't know. I knew who Mr. Birdsall was before I saw him there. I just knew who he was, that was all. I knew what his business was before that. When I saw Birdsall in there Mr. Brand had left.

Q. Did you see Mr. Marron?

A. Yes, Mr. Marron was around there—Mr. Marron never—

Q. Just answer my questions.

Mr. TAAFFE.—Of course, the witness has a right to explain any answer to any question.

Mr. GILLIS.—He certainly has.

The COURT.—Let him finish his answer.

A. Marron never came around there at all—he just made calls.

Q. He just called occasionally?

A. I guess so. [327] He just called occasionally. I would not say that Mr. Marron was there the first time I went in there and saw Birdsall. I kind of

(Testimony of Patrick Kissane.)

think Birdsall was alone. I would not be sure about that. I kind of think Mr. Birdsall answered the bell himself. I went upstairs; he knew me; I believe he called me by name. I called him by name. I had a talk with him. I asked him what he was doing there. He said he was living there. I asked him, as the place was suspected, if he was bootlegging, and he denied it. He said he was living there. I don't think he said Mr. Marron was living there. I don't know whether he did or not. I didn't ask him what became of Brand. I believe he told me he was working for Marron. I would not be sure about that, either, what he did say. That is my best recollection. I told him the place was suspected of bootlegging, that I would like to look around and make sure, and I looked around. I went through the rooms to see if there was any bootlegging there. I would not say I went through all the rooms on that occasion. To the best of my recollection I looked around, of course. I probably went out into the kitchen and on the back porch. I saw no evidence of liquor there at that time. I don't think there was anyone else in the place at that time. I first saw Mahoney there a short time. I really cannot tell you how long after Birdsall came there; it might be a month, or it might be less; I don't know; it might have been more; I really could not tell you. The first time I met Mr. Mahoney he answered the bell and opened the door and admitted me. I walked in and upstairs. I had a talk with him. I asked him

(Testimony of Patrick Kissane.)

what he was doing there. I believe he said he was working there. I would not be sure that he said what he was doing. I probably asked him. He may have said that he was bartender, but I would not really say he did say that. He probably said he was bartender. I don't [328] think I saw Mr. Birdsall there on that occasion. I told Mr. Mahoney the place was suspected of bootlegging. If I remember I think I told him that if I could get any evidence around there there would be somebody get arrested. I made a remark similar to that. He didn't make a remark like that. I would not be really sure of what he said in answer to that, but I kind of think that he said, "Well, you talk to the boss, don't be talking to me," or some remark like that. I told him I would like to look around the place. I walked in and looked around. The doors were open, nothing to hinder me from going through. I don't think I went out in the kitchen or on the back porch. I may have. Sometimes I would go through the whole place, and at other times I might stand and look around—if there was anybody in there, stand and look around the rooms; I would not say I went on the porch every time I went in there. Sometimes I went into the kitchen and out on the porch, and sometimes I did not—I don't believe I ever went out on the back porch. I went to the door and looked out. There is nothing on the back porch, nothing there but a lot of boxes and stuff. There were boxes out there. I could not tell you what kind of boxes they were.

(Testimony of Patrick Kissane.)

There was a lot of rubbish and stuff out there. When I got through my visit to the place the first time I saw Mahoney there, I didn't see any evidence of liquor at all. I saw nothing out of the way at all. I would not say that I started at that time going in there on an average of twice a week; about that time probably. On each of these visits when I went in twice a week I would walk around, and sometimes I would go into a room that was in front when you come up to the landing at the head of the stairs, go in there and look around. Most of the time I believe I walked through pretty near all the rooms. The last time I was in there might have been a few days before the place was [329] raided on the last time, on October 3d. I don't know how long. I don't remember. I believe I saw Mahoney there on that occasion. I don't recall that I met anybody else at that time. I didn't have a talk with Mahoney. We didn't have any conversation I don't think. I used to go in there and walk around and look around the rooms, and he would be around there, and I would walk out. I might say, "Good morning," or something like that. On these visits that I made I don't think I met Marron in there more than two or three times in the whole time. Birdsall used to be there. Sometimes he would be there when Mahoney was there. Once in a great while the two of them were together when I went there, but as a rule Mahoney was there on the day watch, and Birdsall on the

(Testimony of Patrick Kissane.)

night watch, I guess. Each time I went there I inspected some portion of the premises.

Q. When was it you came to the conclusion that Birdsall did not live there? A. Well—

Mr. SMITH.—That is objected to on the ground that it is assuming something that is not in evidence, and also calling for the conclusion of the witness.

The COURT.—If he never did come to that conclusion he can answer that way. You may answer.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I really don't know whether Birdsall lived there. I was never there at night-time, so I could not say. Birdsall told me that he lived there. He told me the first time I met him there. He told me that was his flat and he was living there. I won't say if Marron told me he was living there or not. I think Brand told me he was living there. Mahoney never said he was living there. [330]

Q. When you talked to Mr. Birdsall and he said he lived there, did you believe that he lived there then?

Mr. SMITH.—That is calling for the conclusion and opinion of the witness and is objected to on that ground.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. I really didn't know whether he was living there or not.

Mr. GILLIS.—Q. What do you believe about it?

(Testimony of Patrick Kissane.)

Mr. SMITH.—That is objected to on the same ground.

Mr. GILLIS.—Q. What do you think about it?

The COURT.—Same ruling.

Mr. SMITH.—Exception.

A. I don't know what I did think about it. To tell you the truth about it, I think I thought he was not living there.

Mr. SMITH.—He thought he was not living there —I ask that that go out.

The WITNESS.—(Continuing.) I thought he was not. I didn't know that he was there or not, because I was never there at night-time. I don't know whether I believed him or not when he said he lived there. I would not say I didn't believe that he didn't live there. I don't think I did believe him. I don't know that I didn't believe Brand when he said that he lived there. I could not tell you. I don't remember whether I believed his statement or not. That is going back, Brand is too far back. I don't really know what Brand said, but I know the other party lived there, that I know. By "the other "party" I mean Hawkins. When Birdsall said he lived there I was inclined to believe him. When I went through this place I saw a table and chairs in each room, and there was a couch, I believe, in one room, and some kind of, I think it [331] was, a davenport, or something, in the other. Now then, going into the kitchen, there was a stove in the kitchen at that time. That would be about a year ago, in the first part of 1924, I guess. At

(Testimony of Patrick Kissane.)

that time there was a stove in the kitchen, a toilet there, of course, and a sink, and a little shelving for dishes, I suppose, if I remember right. I would not be sure about a cupboard, but I believe there was. I would not say that I saw any cooking there. I didn't see any dishes there. I would not say about the dishes; there might have been dishes at that time; I would not say. The stove was there. I didn't see any cooking going on, I would not say that I did when I was in there. I didn't see any women folks around the house. I may have seen old empty bottles thrown around. I could not tell you what kind of bottles; they might have been wine bottles; not very many. I think I picked them up, but it was useless to me because I lost my sense of smell so I could not smell what they were. I lost my sense of smell probably four or five years ago. The bottles were empty, not any dregs in them at all. I could not really recall how many bottles, but I know there were some. I may have remembered if they were whiskey or gin bottles, with labels on, but I don't think they were gin bottles; they were wine bottles. I don't think they had a label on them. I think they were unlabeled and empty. Nothing came out of them. I would not really say how many there were. There might have been two or three; no more than that, I would not think so. I saw glasses around. I believe they were whiskey glasses; not very many; I don't think; maybe a dozen. There might have been some highball glasses there, too. I would not say I remember seeing any

(Testimony of Patrick Kissane.)

wine glasses; there might have been wine glasses there. [332] That was in January, the first part of the year, 1924. It might be around that time. I might have been there a few days before October 3, 1924, just prior to the last time the place was raided. I didn't see anything there any more than before, on that occasion. I didn't see Mr. Birdsall there. I saw Mr. Mahoney; he admitted me into the house. I don't think I did say anything to him. I told him why I had come around. I didn't say anything to him, I don't think. Probably I said I was passing by and was looking around the place. He knew what I was in there for, making these calls. I guess I probably said, "How do you do," or something or another. I can't recall what I said to him. I don't know what he replied to me. I went through the premises. I saw nothing more than I did before. I went into the front room. I can't say what time of day it was. It must have been in the forenoon; I would not be sure whether it was in the forenoon or afternoon. I don't think I saw anybody else in there besides Mahoney. I believe I saw the same tables there as I had seen on previous occasions in the room. These tables were in every room besides the kitchen. I think I went in the kitchen at that time. The stove was not there. Everything was in the kitchen, I believe, with the exception of the stove; the stove was gone. I glanced at the back porch. When I went into the front room I didn't see any slot machine in that place. I have never seen a slot machine in the

(Testimony of Patrick Kissane.)

place. I would positively say that there were no slot machines in that place. I didn't see any. If there had been slot machines there I think I would have seen them. I was not looking for slot machines or things of that kind. I was looking for evidence of violation of the law. When I went through the rooms I looked around to see if there was any violation of the law. If I had seen [333] any slot machine I'd know there was a violation of law.

Mr. TAAFFE.—I call your Honor's attention to the fact that it is not a violation of the law to possess a slot machine. It is a violation of the law to have them in a public community. There is a misstatement of what the law is, because you can possess any of these articles as long as they are not used by the public. It is not a crime to possess one.

The COURT.—But it is proper cross-examination in any event, Mr. Taaffe, with regard to the contents and circumstances of the place. I will overrule it.

Mr. TAAFFE.—But he says—

The COURT.—I suppose that if a man had a slot machine in his room it would not be any violation of the law; that is probably so.

Mr. TAAFFE.—That is just the objectionable part of Mr. Gillis' question.

The COURT.—But it is for the jury to say what the character of this place was, whether it was resorted to by the public, or any considerable portion of it, and if there were slot machines, what they were there for. I will overrule the objection.

(Testimony of Patrick Kissane.)

Mr. TAAFFE.—We note an exception.

The WITNESS.—(Continuing.) I don't remember having seen anyone else there besides Mr. Mahoney. I really could not tell you whether I saw any patrons in the place or not. That was last September. On some of my calls up there there were sometimes one or two men there. There was not any more than two men at any one time when I went into the place. The last call I made in September I saw no one, to the best of my recollection, at that time, except Mahoney. I went back into the kitchen and saw the stove was gone. There was a cash [334] register in the kitchen and glasses. They looked to me like whiskey glasses. I don't remember if they were highball glasses. They were clean; they seemed so to me; I don't know; they all looked clean to me. I saw empty bottles. I would not say that I saw any bottles there on the last occasion, on the last call that I made in September; I don't know; I would not say that I did. I may have, but I don't remember. I don't think that I saw any whiskey or gin bottles. I went there to get evidence. If I saw whiskey or gin bottles I considered that that might have assisted me in getting evidence, and there might be liquor in them. I don't think I saw any whiskey or gin bottles. If I remember rightly, there were a few bottles; I think they were wine bottles. The occasion that I saw the wine bottles is some time ago, probably along the first part of the year. In September, I think, probably there might be some wine bottles on the floor; I would not

(Testimony of Patrick Kissane.)

be sure. I would not be sure if I saw any. I don't think I examined any of the bottles at that time. When I glanced out on the back porch I saw a lot of old boxes and stuff, a lot of old boxes and bottles, I believe. There was a mixture of all kinds of bottles. There might be some whiskey bottles in them, gin bottles; I would not say about champagne bottles. I saw empty bottles out there. I didn't examine them. I don't think there were any labels sticking around where I could see them. I would not say if there was any gin bottles or not. I saw the shape and form of the bottles. It was a round bottle. It could be a whiskey bottle, it could be a wine bottle, it could be a bottle that is ordinarily used to contain whiskey. I know what an ordinary whiskey bottle is. It could be one of these ordinary whiskey bottles, it could be used for a whiskey bottle. I know the difference between bottles that are ordinarily used for wine and those ordinarily used for [335] whiskey. I really could not say if it was a bottle that was ordinarily used for wine or a bottle that was ordinarily used for whiskey. It could be used for whiskey. I cannot say that it was a wine bottle or a whiskey bottle. I would not be sure whether I saw any gin bottles there. I believe I did go out there at one time to see them all. I don't think on my last visit in September I went out there to examine them. There were not very many out there. There might be a half dozen; not more than a half dozen; that is about all I saw on that occasion. I had that place under suspicion

(Testimony of Patrick Kissane.)

longer than a year. I would not say that in September, when I went on the back porch and looked at the bottles whether or not I examined them, but I did go out there at times before that. I would not say that I went out there in September; I would not be sure about that.

Mr. TAAFFE.—I think that question has been asked and answered half a dozen times.

The COURT.—Let him answer again. Objection overruled.

Mr. GILLIS—It has never been asked yet.

Mr. TAAFFE.—Exception.

The WITNESS.—(Continuing.) I don't remember that in September I called Mahoney's attention to the bottles on the back porch that could be used for whiskey bottles. Mahoney was around there when I went through the premises. I think he was in the kitchen with me, when I walked in the kitchen and looked out on the porch. I really don't know if he went through the different rooms with me; I don't remember if he did. I didn't see a slot machine in the kitchen; I didn't see a slot machine in the whole place.

Q. Did you draw any conclusion, or had you drawn any conclusion at that time, as to what kind of a business was being conducted there? [336]

Mr. SMITH.—That is objected to on the very ground indicated by the question itself.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(Testimony of Patrick Kissane.)

A. Of course, it was a suspected place of bootlegging, and that is the reason I was visiting it.

Mr. GILLIS.—Q. Suspected of bootlegging, but did you draw any conclusions as to what kind of business they were conducting there, if any?

Mr. SMITH.—The same objection.

The WITNESS.—(Continuing.) I thought they were bootlegging; that was all there was to it. I told Mahoney in September I thought they were bootlegging, but I told him a whole lot of times during the year, and every time that I talked to him he told me, "You go and see the boss." I probably did tell him in September that I thought he was bootlegging there. I didn't ask him if he was doing anything else or conducting any other kind of business there safe bootlegging. I didn't ask him to show me around; he didn't live there; he never lived there. He told me he was a bartender there. I didn't see any evidence of any business being conducted there. It was pretty hard for a man in uniform to get any evidence on a place like that, I went through all the rooms, but I had to climb a long flight of stairs, and wait outside the door until he felt like letting me in, admitted me, and I had to go up a long flight of stairs. I stood in the vestibule, there is a little vestibule there at the front door. It is just one step from the sidewalk. I stood there and pushed the button and went in. After I got there I didn't see any evidence of any kind of business being conducted there at all. If I got any evidence I

(Testimony of Patrick Kissane.)

would make an arrest. I didn't see any evidence of a soft drink place being conducted [337] there, or a barber-shop, or anything else. I would not say that I asked Mahoney in September what kind of a business he was running there. After being there all year, I would not say what I said to him. I don't really know what I did say to him, or if he said anything to *be* or not; probably he went about his business; I don't know. On the occasion of my visits there I didn't see any person, individually, in that place, except Marron, Birdsall, Mahoney and Brand. I saw strangers in there besides those three, once in a great while. Most of the time there was not anybody there when I visited the place, but I have gone up there several times when there was one man, two men at the most. I never counted the times that I saw strangers in that place during the year 1924. I could not figure exactly how many were up there in the year; I could not say. I would say that I saw strangers in there other than Marron, Birdsall and Mahoney more than five times; I would say probably 20 times. I don't think I ever saw more than two people in there at once. The first time I saw strangers in there other than these three men might be a little over a year ago, the last part of 1923, say, October or November or December. The first strangers, if I remember right, I saw in there, I kind of think they were right in the room, right in front of the landing at the head of the stairs. The door was open. The

(Testimony of Patrick Kissane.)

doors were always open when I went there. I would not say that the doors were shut at any time I was there. I believe I went in there these two men were that I first saw. They were sitting down as though they were talking to Mahoney. I think Mahoney let me in. I don't know whether Mahoney went back in the room before I got to the head of the stairs; he may have. After I got up to the head of the stairs he was not five feet away from me; the room is right off the head of the stairs. I don't think he was sitting [338] down. I think he was standing up. I would not be sure, but I think I asked him who the two men were, and he said friends of his. He saw me coming up the stairs. Then he went in where these two men were, and I followed up the stairs, and went in there where he was with these two men. I spoke to him and asked him who these people were. He said they were friends of his. They were just talking; they were smoking, I think, if I remember right. There was nothing on the table, no evidence of any kind of drink on the table. There was nothing to eat on the table. I would not say that there were ashtrays on the table; there might be. That is all the conversation I had. I looked around and went out. I think Mahoney went back to the men. Then I went out. I really cannot tell when the next occasion was that I saw anyone in there; it might be a month or an hour after, that I happened to go in at the time that somebody happened to be in

(Testimony of Patrick Kissane.)

there. They were not at the head of the stairs to receive me. They might be in the front room; they might be in the other room in the back; I would not say about that. I remember an occasion when I can place where the men were that I saw in there. There were some in the front room. I went in there at times when they were in the front room. I never saw any more than two men in the front room. Mr. Mahoney did not always let me in. Mr. Birdsall used to be there once in a great while. I went in there when these people were in the front room. They were sitting down in the front room talking to one another. I didn't see anything on the table, no evidence of anything to drink on the table. I don't think there was anything to eat on the table. I don't think that I ever went in there when there was one man in the front room and one man in another room. When these men were in the front room Mr. Birdsall or Mahoney let me in. Sometimes they would go around the different rooms with [339] me, and sometimes they would go back and talk to their friends. As a rule they would be around. As a rule they would walk around the rooms with me. When I went on my inspection of the flat at 1249 Polk Street, as a rule Marron or Birdsall or Mahoney walked around with me. They were present there all the time. I would not say that every time I went there and went through the rooms that some of these individuals were with me, but pretty near all the time. I was

(Testimony of Patrick Kissane.)

always in sight in these rooms. You cannot lose sight of each other unless you go into the kitchen and you are away from these rooms. I never went in the kitchen when they were not with me. They were down there pretty near all the time. They were probably not there every time in 1924; there were probably four or five times, to the best of my recollection, that they were not with me when I went down to the kitchen; maybe more and maybe not that much; probably five times. There was wicker furniture in this place. I could not tell you how many rooms were fitted out with wicker furniture. I cannot recall, but I am sure there was one room anyway. I would not be sure about that. It is so long ago, I forget; I can't tell; I could not tell you if these rooms had cuspidors in them. I could not tell you if there were cuspidors in at least three of them; it is quite awhile ago. I can't remember back that far now. I have been going over this entire situation in my mind since last October. I have thought back over what I did in that place and what I saw in that place, but about the spittoons, I didn't keep those in my memory. That is something I didn't give much attention to. I can't recall the first time that I saw that the stove had been removed from the kitchen. I can't tell you approximately. It would make an impression on my mind; I kind of think it must have been removed somewhere around July or August, 1924; I would not be sure about that. I didn't talk to Sergeant [340]

(Testimony of Patrick Kissane.)

Gorham about this place at any time prior to October 2. I never did. He never was in that place with me. I don't think that I ever talked to him about it. Captain Casey received my written reports. I don't know how many reports I gave to him; probably two or three, as near as I could judge. It was not customary to make reports to Captain Casey if I didn't discover anything, only when he calls for it. I never discovered anything so I didn't make any reports to him.

Q. Now, when you went in there and saw Birdsall in there for the first time, you knew that Birdsall had been a bartender, did you not?

Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, and there is nothing in this record to show that Mr. Birdsall was a bartender, and not involved in the issues, whether he was a bartender or not; and I ask that the question be stricken from the record.

The COURT.—The motion is denied and overruled.

Mr. SMITH.—Note an exception.

A. Yes, I did.

Mr. GILLIS.—Q. You knew that was his principal business, didn't you?

A. Yes, and had been for a great many years.

Mr. SMITH.—I will object to that on the ground that it is immaterial, irrelevant and incompetent, and has no bearing upon the issues of this case what he had been doing for a number of

(Testimony of Patrick Kissane.)

years; we are only concerned with what happened from May, 1923, the period covered by this indictment.

Mr. GILLIS.—I am only asking if he had that knowledge of this man at that time.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. Yes. [341]

Mr. GILLIS.—Q. And that was one of the things that led you to suspect the place as a bootlegging place when you saw him in there, was it not?

Mr. SMITH.—Same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. Well, I suspected it as a bootlegging place before ever Birdsall came there.

The WITNESS.—(Continuing.) That rather convinced me it was a bootlegging place. When I was in the place, going around these rooms, if they were not following me, I didn't look into the cupboards or anything like that. They were closets, not cupboards. The closets were locked. I didn't look in the cupboard in the kitchen. I didn't open the cupboard at all in the kitchen. They were around there, close by. They never stopped me from doing anything that I wanted to do, but I tried the closet, there was one in the hall, and some in the rooms, and I found them locked all the time. They didn't object to me trying the door, but it was locked. I said to them, "It is locked. What have you got inside there?" "Well," they said, "hands

(Testimony of Patrick Kissane.)

off, you have not got a warrant," or some such remark. I don't think they told me that every time I went in and tried the door. Every time I went in there I found the door locked; I found them locked every time I tried them. I think I tried them every time I went in. They always said to me, "Hands off, you haven't got a warrant." When I tried the door they would make a remark of that kind. I don't really know what answer I made. I really don't know what—"It is locked" or something like that, that I made a remark about it had been locked. I don't think I ever did look into the cupboard of the kitchen. I saw glasses on the drain-board in the sink, but they were washed, on a shelf right [342] along there by the cash register. I don't know that I asked him what he was using these whiskey glasses for. I may have asked him what he was using the highball glasses for. I really could not recall it. I believe I might have asked him something about the wine bottles and those other bottles on the porch that I said might be used for whiskey. He made some kind of a laughing remark, I believe once, when I asked him about, "What about these bottles?" and he said he didn't know. I did go out to the bottles and I picked up a bottle at one time, and I turned it over and it was empty. I don't think I picked up the bottle on the back porch. It looked as if it was there for a long time. I believe I picked up bottles on the back porch. Probably I did pick up one or two and turn them over, but they were empty. I

(Testimony of Patrick Kissane.)

really could not tell you if there were labels on them. If I did I could not recall it now. I may have looked to see what label was on. I was there for the purpose of determining whether or not this was a bootlegging joint. That was the object in going there, and my only object. I knew Birdsall had been a bartender before. I believed it was a bootlegging joint. The bottles on the back porch looked to me like they were there for a long time. They were kind of worn out. That is quite a while ago that happened, so I really cannot recall whether I went out on the back porch and picked up the bottles to see what labels were on them, or examined each one of them. There was more than one occasion I saw the bottles there on the back porch. There were different bottles on those occasions. I did look to see what labels were on the bottles. I think one was a gin bottle, if I am not mistaken. I believe it had the label of Gordon Gin on it. There was never more than one gin bottle there. The gin bottle was empty, and I threw it down. I just left it there. I didn't report that back to Captain Casey, nor to any of my superior officers. I didn't consider that that was any evidence, because [343] the bottle was empty. It was laying out there for a long time. I didn't think the fact that it had "gin" written on it and was a gin bottle was of sufficient importance to take it to my superior officers. I didn't make any report of it. The gin bottles, the wine bottles, and these bottles that I said could be used for whiskey were the only bottles I

(Testimony of Patrick Kissane.)

saw there. That was all. I don't think I saw any beer bottles there. I don't think I saw one. I didn't see any ginger-ale bottles there. I don't think I saw any Shasta water bottles there. There was an ice-chest in the kitchen. I would not be sure whether there was an ice-chest there or not; I don't remember whether there was an ice-chest there or not; I am not sure. I can't remember whether there was an ice-chest there or not. I think I did see ginger-ale bottles there,—I mean Shasta bottles, those big bottles. They were in the kitchen, probably three or four. I think they were full, some of them. When Mahoney told me on one occasion that he was a bartender, and I would have to see the proprietor, I knew who he meant by "the proprietor." He meant Birdsall. I understood him to mean Birdsall. That was the only conversation I had with him. When he said he was a bartender, that aroused suspicions and interest in my mind as to what he was a bartender of. I knew there was bootlegging carried on there, we suspected it, but we could not get the evidence. I think I asked him what he was a bartender of. He told me to go to the boss, or some remark like that. The boss was not around. I didn't go to him at any other time. I saw Birdsall there after that. I believe I told Birdsall that Mahoney said he was a bartender, and I wanted to know what he was a bartender of. Birdsall didn't say anything to this. I don't think he did. When I first met Marron I asked him what he was doing, if he wasn't bootlegging there, and he

(Testimony of Patrick Kissane.)

denied it. I asked him if he [344] was living there, and he said Birdsall was there at that time. Neither Mahoney, nor Birdsall, nor Marron ever offered me drink at that place, in any shape or form. They didn't want to give me a drink of ginger-ale. They never paid me a cent for looking after the place, not a penny. No one connected with this 1249 Polk Street ever gave me a cent. They never offered me a drink. I never saw any drinks served in there. Outside of the full Shasta water bottles, I never saw any other bottles with any liquid that could be served as a refreshment. The other bottles were empty. The Shasta water bottles were full. I never saw anything there that was fixed for people to eat in that place. I probably rang three or two bells to get into the place. I had no certain bell to ring. I just went up and pushed the button.

Redirect Examination.

(By Mr. TAAFFE.)

The lower floor is a restaurant. The ceiling is pretty high. I really could not tell you how high. I really don't know how many steps from the vestibule where you ring the bell up to the top of the stairs, but it is pretty high. It is as high as the ceiling of this courtroom. The steps went directly up, and then you turned when you got to the top. On each occasion that I entered the premises it was necessary first to attract the attention of someone on the inside and ring a bell. My visits were about the same time each day that I went in there. I

(Testimony of Patrick Kissane.)

would go in at the same time every day. I visited the place at different times. I had no set time to go in. I went there for the express purpose of getting evidence to make an arrest, if such evidence could be found, and I didn't at any time ever find any such evidence.

(R. Tr. Vol. 6, pp. 329–374, inc.) [345]

TESTIMONY OF JOSEPH GORHAM, FOR THE DEFENDANTS.

JOSEPH GORHAM, a witness called for the defendants, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Joseph Gorham. I am a Sergeant of Police of the San Francisco Police Department. I have been Sergeant of Police of the San Francisco Police Department for about four or five years, I am not sure. I was a member of the Police Department before I acquired the rank of sergeant for 20 years last April I was appointed originally. I was first assigned to the Park Police Station. I don't know how long I remained there—between the Park and O'Farrell Stations, which are part of the same district, I put in ten years. After that I went to the Southern Station. I was sent to the Southern Station. I was there until about November, 1916. From the Southern Station in 1916 I went to the Bureau of Permits and Registration, Hall of Justice. I remained there five years.

(Testimony of Joseph Gorham.)

Chief O'Brien, who was at that time Chief Clerk, was the head of the Bureau of Permits and Registrations in the Hall of Justice at that time. Chief O'Brien's rank at that time was Chief Clerk to Chief White. Lieutenant Casey had charge of that particular place. Chief O'Brien was the man in the clerical force in charge of the Bureau of Permits and Licenses in the Hall of Justice and was at that time Sergeant and Lieutenant. Captain Casey is now Captain of Police District No. 5, being the Bush Street Police Station. I remained in the Bureau of Licenses and Permits for a period of about five years. From there I went to the Southern Station. I remained at the Southern Station until last March, from November, 1921, to March, 1924. In March, 1924, I went from the Southern [346] Station to the Bush Street Station. I was assigned to the Bush Street Station on March 7, 1924. I reported to Captain Casey at that station. I have been attached to that station ever since the 7th of March, 1924. I reside at 1132 Masonic Avenue, San Francisco, with my mother and brother. My father is dead. I live with my mother and brother at that place. I have lived there for four years this month. My attention was first drawn to the premises at 1249 Polk Street on the 27th day of March, of last year. There was a complaint from the Chief's office that bootlegging was carried on there. That complaint was dated the 26th of March. It was given to me on the 27th for investigation. I went out on the 29th of March with Officer William Maguire, about

(Testimony of Joseph Gorham.)

eight o'clock at night. I went out to this place, 1249 Polk Street, at eight o'clock on the night of March 29th, in the presence of Mr. William Maguire, and I met George Birdsall at the head of the stairs, and from the way he greeted me, he apparently knew I was on that detail. I stated my business up there. I told him we had a report that there was bootlegging in the place, and I came up for the purpose of searching his place, and he wanted to know if I had a search-warrant, and I told him I had not, and he refused to give me permission to search the place. I got into the place by ringing the door-bell downstairs. There is a flight of stairs from the door to the landing. The door is set in about three feet from the sidewalk. It is up on a step, and this flight of stairs is probably three feet inside of the door. On that occasion I got into the premises as far as the head of the stairs, or the hallway at the head of the stairs. Birdsall had no hat on and he was in his shirt-sleeves. I told him we had a report —he greeted me when we came up, and said, "I see you are on the detail over here," and I said, "Yes, we have got a report you are bootlegging [347] up here, and we want to search your place." He wanted to know if I had a warrant, and I told him I had not, and he said without a warrant I could not search. That was on the 29th of March. On the 27th Maguire was off, and I was off on the 28th and on the 27th I sent a young man named Ward, who was on the detail with me at times up there, for the purpose of seeing if he could make a buy of any

(Testimony of Joseph Gorham.)

liquor there, and he was unsuccessful. I took up with William Golden, who was the Chief Bond and Warrant Clerk of the City and County of San Francisco, the question of my visits to Birdsall's place, and his refusal to allow me to search it. I stated exactly what the situation was there, and told him I wanted to get a warrant to search the place, and he refused the warrant, because I could not testify to a sale of liquor up there, and I could not get anyone else that would testify to a sale. This man William Ward, whom I sent there, is a man who was referred to as the special detail. The other man of the detail is Maguire. I was the ranking officer, the only noncommissioned officer in the bunch. James M. Mann is a Patrol Sergeant in the Bush Street Station. Sergeant Goodman H. Lance is a patrol sergeant in the Bush Street Station. Sergeant James J. Farrell is a patrol sergeant in the Bush Street Station. Police Officer Robert E. Garrick is a police patrolman like Kissane. James A. Foohig is likewise a patrolman. The difference between a special detail police sergeant of the Bush Street District and the patrol sergeant is that the patrol sergeant is assigned to a certain section, he just keeps the patrolmen in that section under his direct supervision; he visits them at irregular times during the watch, checks up on them, to see they are patrolling their beat, if they are on a particular detail to see whether or not they are attending to that detail; if a complaint comes in about something on a beat that is referred to a patrolman, it is up to him

(Testimony of Joseph Gorham.)

to see that the patrolman is taking the proper action on it. [348] I was not a sergeant of police, assigned to the special detail, called upon to patrol any particular beat. My duties were the same as the sergeant of the platoon. In detail my duty as a special detail sergeant differed from those of a patrol sergeant in this: That a patrol sergeant is in uniform; I do not wear a uniform on that detail. I was in court practically every morning. I would report to the station about ten o'clock on my way down to the police court. After finishing up my business in court, I would always have to meet the captain at two o'clock in the afternoon for the purpose of discussing complaints received, the arrests made on the preceding day, disposition of cases in court, different matters he might want to see me about, and all complaints from the Chief's office, and other complaints that would come within the scope of the special detail were turned over to me for investigation. These complaints comprised bootlegging, prostitution, gambling and narcotics. We got a great many of them. In addition to the ones I got from the Chief's office, there were letters written in, anonymous letters, that came in more or less every day, and telephone messages about conditions at different places, and we likewise had all losses and stolen property, and petty larceny, of course, to investigate. Neither Mr. Maguire nor Mr. Ward, who were associated with me on this special detail, were obliged to wear a uniform. The duty cast upon me as a sergeant in charge of the police detail,

(Testimony of Joseph Gorham.)

and the members of it, Mr. Ward and Mr. Maguire, caused me to rove practically all over the district, investigating matters. It took us away from the district on the night of March 29th, at eight o'clock, when I went up to 1249 Polk Street with Mr. Maguire. We were not at the premises two minutes. Birdsall refused to allow us to search the premises, basing his refusal upon the ground that I had no search-warrant. From [349] where I met Birdsall at the head of the stairs, I could see, he has a great big hallway, there are six rooms there, and all the rooms open into this one hallway, a sort of oblong hallway, and at that time, or another occasion up there, I could see where one of the rooms was furnished up apparently as a living-room. There was a part of a Chesterfield suite in there. The visit I made with Officer Maguire on the 29th of March, 1924, was the first time I was ever in the premises. After visiting these premises I made a report to Captain Casey of what happened there. Before making that report I went to see Mr. Golden of the Bond and Warrant Clerk's office, of the District Attorney of this city and county, for the purpose of securing a warrant to search the premises. That warrant was denied me by Mr. Golden on the statement that I had no evidence upon which to issue it. The next time I went there, there was a burglary committed over there some time during the month of May, and there were two fellows arrested in the commission of the burglary; Birdsall refused to swear to a complaint against either of them.

(Testimony of Joseph Gorham.)

Captain Casey told me to go over to see Birdsall and urge him or persuade him, or in some manner get him to go down and swear to the complaint, and the case was continued. I went over again—he then had one of the arresting officers swear to the complaint and subpoena Birdsall as a witness in the case. I never heard of George Hawkins in my life until this case. I know the defendant Marron. The first time I came in contact with defendant Marron was when I was in the Bureau of Permits. He was interested in the dance hall, at the Moose Hall, a permit granted under the Board of Police Commissioners, and he came down there in reference to that on at least one occasion, possibly more. The next time I met him was in August, 1923, I think it was August 15th, that a posse accompanied by Lieutenant Healey, [350] arrested Eddie Marron, a man named Hobson, a man named Murphy, and two Italian fishermen; I can't remember their names. It was over on the China Basin, up near Pier 54. At that time we seized a fishing boat, three automobiles, and approximately 150 cases of liquor, some in cases, some in sacks; we arrested and we charged Marron and the first ones I have named, Hobson and Murphy, with criminal conspiracy. Marron had a pistol on him at the time, and we put in a special charge on him of violating the Assembly Bill covering that act; and later on we arrested these two fishermen and charged them with conspiracy, and also transportation and possession of liquor. We booked the fishing boat and three auto-

(Testimony of Joseph Gorham.)

mobiles in addition to these other things as evidence. I never saw Marron in No. 1249 Polk Street. I was in 1249 Polk Street with Captain Casey on the date of October 7, 1924. I saw him on that date. That is the only time I ever saw him in that place. The circumstances of my meeting him at that time and place were that Captain Casey told me that he was going to get a statement from Marron, Birdsall and Mahoney in connection with the arrest that had been made there four or five days previous, and likewise in connection with the statement or report there in regard to money being paid out to police officers, etc. I went up there and got a statement from Marron at that time. Marron denied that he ever paid any money to police officers. Birdsall was not there at the time. Mahoney was there. Mahoney did not participate in the conversation. He would not make any statement, or he did not take any part in it. I met Marron on the outside on that occasion. I would not be sure as to Mahoney. Mahoney may have been in the place when we went in. This conversation occurred in one of the rooms in 1249 Polk Street. It was the front room, and I think it is the farthest room, nearest to Sutter Street —that would be on the [351] southerly end of the building. We were up there I should say 10 or 15 minutes. I was not present at a subsequent interview between Captain Casey and Birdsall, held the same day at the Police Station. That was over at the Police Station. I was not there. I didn't either on or about the 31st day of March, 1924, or

(Testimony of Joseph Gorham.)

at any time, accept from any one of the defendants named in this proceeding, George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, or Charles Mahoney, any money, great or small, for the purpose of protecting 1249 Polk Street, or any other place. I was never in the premises referred to throughout the evidence in this case as 2031 Steiner Street. I was never in the premises referred to throughout the evidence in this case as 3047 California Street. I was never in the premises referred to throughout the evidence in this case as 2922 Sacramento Street. Those places are outside of the district. Those three places are wholly outside of the Police District No. 5. (The attention of the witness was then directed to United States Exhibit 7.) This is a report written by me. It is the report of April 1, 1924, which I have referred to in my testimony. (The attention of the witness was then directed to another document, dated October 13, 1924.) This document is a report written by me concerning those same premises. I didn't read the report that has just been called to my attention; I just looked at the writing. That report was in response to an order signed by the Chief to Captain Casey with reference to a prior report made by me. (The attention of the witness was then directed to United States Exhibit 37.) This document is in my writing. These three reports are all reports made by me to Captain Casey in response to an investigation made by me concerning 1249 Polk Street. I never did have any

(Testimony of Joseph Gorham.)

conference or understanding of any kind with either George [352] Hawkins or Walter Brand or Joseph E. Marron, *alias* Eddie Marron, or George Birdsall, *alias* George Howard, or Charles Mahoney, either individually or jointly, in which I agreed with them, or any one of them, or conspired, or confederated with any one of them, or all of them, to allow the maintaining of a a nuisance at Polk Street, or Sacramento Street, or Steiner Street, or California Street, or for the illegal possession of liquor at any one of these premises, or for the sale of liquor at any one of those places, or to permit the transportation to or from any one of those places of liquor illegally, or otherwise, or at all, at any time. As a matter of fact, the only time I have ever talked to Mr. Marron are the times I have indicated here—the time that I arrested him and the time I was up there to get the statement. I don't know George Hawkins. I never saw Walter Brand until I met him out here in connection with this case, or Charles Mahoney, at any time. George Birdsall never at any time or any place paid me any money for any purpose. None of the defendants named in this indictment has ever paid and I have never received from any one of them any money directly or indirectly for the purpose of permitting violations of the law charged in this indictment against them, or any other violations of the law. I never conspired with my fellow police officer, Patrick Kissane, to allow any violation of the law at any of these places. I never remember speaking about this place at all to Kissane.

(Testimony of Joseph Gorham.)

Cross-examination.

(By Mr. GILLIS.)

I went there on March 29th about eight o'clock at night. Officer William Maguire was with me. I was in plain clothes. We had to ring the bell before we would be admitted. [353] George Birdsall opened the door. I could not see him, there was a turn in the stairs up at the head. He greeted me I think before I greeted him. He said, "Well, I see you are on the detail here," or something to that effect, showing that he knew I was on the detail. I had gone there in answer to a request from Chief O'Brien's office that the place be investigated. It was an order from the Chief's office. I had gone there for the purpose of investigating this place in compliance with that order. I have known Birdsall for over twenty years.

Q. When you saw him at the head of the stairs, you knew at that time that Birdsall had been a bartender for a great many years, did you not?

Mr. SMITH.—That is objected to on the ground it is immaterial, irrelevant and incompetent, and has no bearing on the issues in this case.

The COURT.—Overruled.

A. I have always known Birdsall, either as bartender or saloon man, except there was one time he worked for the gasoline station upon Divisadero Street.

The WITNESS.—(Continuing.) He worked there at the gasoline station for probably a couple of

(Testimony of Joseph Gorham.)

years. The last time I had seen Birdsall previous to that time I met him at 1249 Polk Street, was when I saw him at the gasoline station. I could not say how long prior that was to my visit to 1249 Polk Street; probably a couple of years. I was friendly with him. I was never unfriendly with him. He spoke to me, I think, before I spoke to him. He said he knew I was on that special detail. I told him yes, that I was, we had come up there to investigate his place, an alleged bootlegging place. He said he lived there. He said that was his residence. He would not indicate at all whether he was doing any business there or not. I told him about the [354] substance of the complaint. I told him I wanted to search the place, and he asked me if I had a warrant, and I told him I had none. I was already in the place but he would not permit me to go through the different rooms. There was one of the doors open in one of the rooms, and I think that was the room that we were in when I was with Captain Casey, when we interrogated Mahoney and Marron. I was very sure that that was the door that was open. To the best of my recollection, it was open when I went up there. I didn't go inside. That is my best recollection, there was furniture of a regular davenport set, there was a davenport, or lounge, whatever you call it, a part of that suite, and one of these easy chairs; I would not say as to whether or not there was a table. I did not go directly to the room; that room was perhaps ten

(Testimony of Joseph Gorham.)

or fifteen feet from where I was standing. It was not directly in front of me, like the head of the stairs would be here, I would be standing here, and the entrance to that room would be over about where this chair is, on the opposite side of the table from you. It would be easily 15 feet from you. I believe Birdsall is married. I didn't see anybody else there. I don't know his wife. I didn't talk with Birdsall as to what he had been doing the past few years. I didn't ask him how he happened to come to live there. I never had numerous reports that he was bootlegging there. That was the only report I ever had of it. I didn't tell him I had numerous reports that he was bootlegging there. I told him I had this particular complaint. He said he lived there, and he was in his shirt-sleeves, and would not let me go any further. I didn't know at that time that Officer Kissane had gone in there twice a week for over a year. The place was specially assigned to me with others to investigate. After I could not gain admission, after March 29th, I had Officer Ward make [355] probably half a dozen visits to the place. There was nothing I could do. He knew me. I might as well go up there in uniform as I did. I did do something further. I made application for a search-warrant to search the place. That was the one I testified to. I had Officer Ward go up there on probably half a dozen occasions. I didn't do anything else besides go into the Bond and Warrant Clerk's office. I just di-

(Testimony of Joseph Gorham.)

rected the man that was working under me what to do. That was Ward. Outside of the directions I gave him, I did do something else. I saw he went up there and carried out my instructions. I was across the street. He was with me every time I sent him up there; I was on the corner, across the street. Outside of the time I sent him up there, I did nothing. There was nothing else I could do after that at that place. I didn't fall down on it after my report of April 1st that I would give that complaint continued attention. I did not. I always kept sight of the fact that it was a bootlegging place, and any time there would be an opportunity to make an arrest there I would go up there and make it. I had no opportunities. I had to wait there until there would be liquor purchased. There was no opportunity available to me. I did try to make an opportunity other than sending Ward up there. Any time I passed the place, for instance, if there was any liquor being brought into the place I would have taken action on it. I passed the place sometimes every day, sometimes more than that, at different times of the day. I didn't stand outside that place to see how many people went in. I have nobody to station to see how many people went in and out. I am not making details. I did not station anybody outside of the place to see whether there was liquor taken into that place. I never went down to the Clerk of the District Court here to ascertain whether any complaints or informations had ever

(Testimony of Joseph Gorham.)

[356] been filed against this particular place. I made no investigation of the records of this court. There was never any record in the Police Court with reference to that place, to my knowledge. I never made any investigation at that particular place as to whether there was or not. I didn't know the place was raided on May 15th. I didn't know that George Birdsall was arrested at that time. The first time I found that out was when I was in court the other day. The place is a little over half a block from the Bush Street station. I did give the place continued attention from that time on. I kept it under observation any time I was in the neighborhood; that was all I could do. I didn't go there in May to investigate a burglary charge. I went there for the purpose of having them swear to a complaint for a burglary that had been committed there. The burglary was committed and the arrest made on the night watch. I didn't go there to investigate the burglary. I went there for the purpose of having them swear to a complaint against the burglars. I saw George Birdsall there. I met him about the same as I had the first time, up at the head of the stairs. I told him that there was a burglary committed there, that Captain Casey instructed me to come over and have him come down and swear to a complaint against these men. He said he knew the men and did not want to do it. I didn't ask him anything about the burglary. I knew the men were already arrested. There was

(Testimony of Joseph Gorham.)

nothing to investigate in connection with the matter. I didn't ask him to look at the place where the men came in. I didn't ask him to take a look at the place where the burglary had happened. He didn't invite me in. The doors were closed on that occasion; all of them. I don't recall what the burglary was. It was something like $200 or #200, if I remember correctly. I could not say if there was liquor involved in it. I don't think so. I don't know. [357] (The attention of the witness was then directed to a report dated October 13th: "In compliance with the order of October 12, you had visited these premises about two months ago to see George Birdsall in connection with a burglary committed there. On each of these visits I was received by George Birdsall at the head of the stairs in the hallway, the doors of all the rooms were kept shut, and I could see no slot machines in the premises, nor could I observe whether or not there were any people in the place.") I don't think that report is a mistake. The report is absolutely correct. On one occasion there was one of the doors open. I went there twice on that burglary up there. The first time he refused to go down, and then I went over on another day, the following day, to further urge him to go down; and when I told the Captain he would not go, that is when he had a subpoena issued. I went there twice on the burglary charge. The following day I believe I went there after the first time I was there. I don't recall what date

(Testimony of Joseph Gorham.)

the burglary was committed, but the first day when the case was called in the police court, Birdsall did not show up to swear to the complaint—I don't recall the date. It was in the month of May. I don't recall what time in the month of May. I would not say whether it was early, or middle, or latter part of May, I could not say. I never looked up the date of it. I don't know the date. I think it was the following day after the first visit I went there on the second visit with reference to the burglary. I saw Birdsall again. Birdsall said the same thing, that he did not want to prosecute these men. I met him the same place, at the head of the stairs. The doors were closed. That was the extent of our conversation. (The attention of the witness was then directed to the report of October 13: "October 13. To Captain John J. Casey. Subject: Conditions observed at No. 1249 Polk Street. [358] In compliance with your order of October 12, 1924, relative to conditions observed by me and visits made to 1249 Polk Street, I will state that about the latter part of March of this year, I visited this place to secure evidence of alleged bootlegging there, and was refused admission to any of the rooms unless I had a warrant. I again visited there several times about two months ago to see George Birdsall, in connection with a burglary committed there. On each of these visits I was received by George Birdsall at the head of the stairs in the hallway, the doors of all the rooms were kept shut, and I could

(Testimony of Joseph Gorham.)

see no slot machines on the premises, nor could I observe whether or not there were any people in the place.") I might have been mistaken when I made that report to the effect that all of the doors were shut on each of my visits there. I know the first time I went there I did see the door open. I didn't check up to see what time that burglary was committed. It appeared to me it was about two months, perhaps, and the time I made wrong. It is absolutely wrong, as far as the burglary is concerned, yes. I did not see anyone else besides Birdsall there. I never saw Mahoney in the place. I never saw him going in or out. I never did cease giving 1249 Polk Street my attention. I never ceased to walk up and down past the place. I was past there very often. These are the only occasions that I was ever in that place, as far as I can recall. I was in plain clothes all the time I was detailed there. I can't recall any other times than the occasions I have testified to that I was in that place. I may have been there once or twice; I can't remember. I don't think I could recall that I had been there other times than the occasions that I have testified to. I was specially detailed to investigate that place. I knew Birdsall was a bartender and suspected of bootlegging. I don't recall whether or not I had been there at other times. I had one hundred other places of the same character to investigate. I could not tell you where I had been, as to any particular place, on any certain day. I can't recall that I

(Testimony of Joseph Gorham.)

had [359] been in there at other times; I might have been, but I can't recall. I never saw anybody else in the place besides Birdsall. I never had a drink in that place in my life. I never took any money out of that place. The first time I was there I was there only about two minutes, and the other times that I was there was about the same length of time, about two minutes.

(R. Tr. Vol. 6, pp. 374–396, inc.)

TESTIMONY OF WILLIAM MAGUIRE, FOR THE DEFENDANT JOSEPH GORHAM.

WILLIAM MAGUIRE, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is William Maguire. I reside at 609 22d Avenue. I am a police officer attached to Company E, Bush Street Station, and have been so attached for 15 years. I know Sergeant Gorham. I was associated with Sergeant Gorham in the performance of police duties in the Bush Street Station, since around March 8, 1924, until about October 11, 1924. Prior to and on or about March 8, 1924, I was on what they call the special detail of that district, and I continued on it after the arrival of Sergeant Gorham. I was under him. The other member of that special detail was one William Ward. I was on that special detail before Sergeant Gorham took command for

(Testimony of William Maguire.)

about 11 years. I accompanied Sergeant Gorham to the premises at 1249 Polk Street on Saturday, March 29th, about eight P. M. We reported in for duty at the Bush Street Station at 7:30, which was our regular hour; so after looking over our orders, Sergeant Gorham instructed me to accompany him to this place, 1249 Polk Street. We entered. Sergeant Gorham [360] rang the bell. We were admitted by one George Birdsall, who was standing at the head of the stairs. He had his coat off, and also his hat, and his sleeves were rolled up. So Gorham did the talking and explained to him that there was information from the office of the Chief of Police with reference to bootlegging there, which he denied, and he refused any further admittance to the premises, stating that he was standing on his constitutional rights, and we could not enter without a search-warrant, that that was his home. We immediately left after questioning him. I met Birdsall five or six years ago in Chinatown. He was a guard when I was in the squad. He knew I was a police officer when I was present with Gorham that night.

Cross-examination.

(By Mr. GILLIS.)

In my duties with reference to 1249 Polk Street, when I went there, I was under the orders of the Captain of the district. I was assigned to Sergeant Gorham for special duty, as his associate. In the morning we reported to the captain at ten o'clock every day; we were in court, and came

(Testimony of William Maguire.)

back at two, and reported direct to the captain, and in the evening Gorham got all his orders, and he assigned Ward and I to do special work. If we did anything with reference to that place we didn't do it under Sergeant Gorham's orders, directly under the captain, but Gorham being the sergeant of the detail, he gave the directions after he got them from the captain.

(R. Tr. Vol. 6, pp. 396–398, inc.)

[361]

TESTIMONY OF DANIEL J. O'BRIEN, FOR THE DEFENDANT JOSEPH GORHAM.

DANIEL J. O'BRIEN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Daniel J. O'Brien. I am Chief of Police of the city and county of San Francisco, and have been so a little over four years. I reside at 150 Corona. I am acquainted with Sergeant Joseph Gorham. I have been intimately acquainted with him since about 1916. I was at one time Chief Clerk to the late Chief White. Sergeant Gorham worked under me during the time I was Chief Clerk to the late Chief White, in the capacity of clerk in the Bureau of Permits and Registration. He was assigned to that duty in 1916, and was there when I was appointed Chief of Police, and remained, I would say, for at least a year

(Testimony of Daniel J. O'Brien.)

afterwards. I have never discussed his general reputation in the community in which he lives for truth, honesty and integrity with anyone. I know his general reputation in so far as police officers are concerned. I know him as a police officer. His reputation is good. I know defendant Patrick Kissane as a police officer. He was never under my direct supervision. About 1910 I think, maybe the latter part of 1909, about 1909 or 1910, I was assigned as a patrolman to the Bush Street District, and was on one watch; he was on another watch; I did not come in contact with him. Other than being a police officer and member of the San Francisco Police Force I have had no contact with him and do not know anything with reference to him. I have not discussed his general reputation in the community in which he does police duty as a police officer. The reason I could testify [362] in Sergeant Gorham's case is that Sergeant Gorham worked directly under me. I have never worked in the same watch with Officer Kissane, and had no discussion with reference to his police work with anybody in the district. Since I have been Chief of Police, if there were complaints made with reference to the efficiency of Officer Kissane as a police officer, they would come direct to me, under my supervision, as Chief of Police. There have been no such complaints made in the four years that I have been Chief, except in this particular case. Prior to this case there were none.

(R. Tr. Vol. 6, pp. 398–401, inc.)

TESTIMONY OF TERESA MEIKLE, FOR THE DEFENDANT JOSEPH GORHAM.

TERESA MEIKLE, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Teresa Meikle. I reside at 121 23d Avenue, San Francisco. I am Assistant District Attorney assigned to prosecuting all cases in the Women's Court. I am under District Attorney Matthew Brady. I have been Assistant District Attorney under District Attorney Brady for the past two years. I know Sergeant Joseph Gorham. I have known him for the past seven months, since he has been assigned to the special detail in the night life cases. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good. [363]

Cross-examination.

(By Mr. GILLIS.)

I don't come in contact with Sergeant Gorham only in my official capacity, in that I talk to these girls that are arrested afterwards and speak to them, and for that reason I would really know the way they were treated by Officer Gorham. It is through my official capacity. That is the only way.

(R. Tr. Vol. 6, pp. 401–402, inc.)

TESTIMONY OF JOSEPH S. LEWIS, FOR THE DEFENDANT JOSEPH GORHAM.

JOSEPH S. LEWIS, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Joseph S. Lewis. I reside at 1860 Jackson Street, San Francisco. I am a wholesale jeweler, and have been such for the past eight years. My business is located at 133 Kearny Street. I know Sergeant Joseph Gorham, and have known him about 15 or 16 years. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 402.)

TESTIMONY OF CHARLES W. GOODWIN, FOR THE DEFENDANT JOSEPH GORHAM.

CHARLES W. GOODWIN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Charles W. Goodwin. I reside at 506 [364] 5th Avenue. I am Vice-President and General Manager Marine Electric Company, located at Front and Howard Street. I know Sergeant Joseph Gorham. I have known him for

(Testimony of Michael J. Hanrahan.)

approximately 20 years. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 402, 403, inc.)

TESTIMONY OF MICHAEL J. HANRAHAN, FOR THE DEFENDANT JOSEPH GORHAM.

Direct Examination.

(By Mr. KELLY.)

My name is Michael J. Hanrahan. I reside at 412 Ashbury Street, San Francisco, California. I am retired from business. Prior to my retirement I was engaged in the grocery business. I know Sergeant Gorham, and I have known him 16 or 17 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, p. 403.)

TESTIMONY OF FRANK J. EGAN, FOR THE DEFENDANT JOSEPH GORHAM.

FRANK J. EGAN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Frank J. Egan. I reside at 1251 32d Avenue, San Francisco. I am Public Defender of the City and County of San Francisco. I have been such for three years last past. I know Sergeant

(Testimony of Frank J. Egan.)

Gorham. I have known him all my life, for 42 years. I know his general reputation in the [365] community in which he resides for truth, honesty and integrity. His reputation is good. As a Public Defender connected with the city government, in my capacity as an attorney, I came in contact with him. He is a very vigorous prosecutor. I will say that for him.

(R. Tr. Vol. 6, p. 404.)

TESTIMONY OF WILLIAM T. HEALY, FOR THE DEFENDANT JOSEPH GORHAM.

Direct Examination.

(By Mr. KELLY.)

My name is William T. Healy. I reside at 4125 Anza Street, San Francisco. I am Captain of Police, and have been such for one year. At the present time I am Commander of Richmond Police District. Prior to becoming Captain of Richmond Police District, I was a lieutenant attached to the Southern Station. Sergeant Gorham was down there at the time I was there. I have known Sergeant Gorham for 17 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 404, 405 inc.)

TESTIMONY OF JOHN J. O'MARA, FOR THE DEFENDANT JOSEPH GORHAM.)

JOHN J. O'MARA, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is John J. O'Mara. I reside at 536 5th Avenue, San Francisco. I am Captain of Police, attached to the Park Station, and have been there for one year. I know Sergeant [366] Gorham. I have known him for 29 years. I knew him before he became a member of the police force. I have known him since he became a member of the police force. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, p. 405.)

TESTIMONY OF JOHN J. CASEY, FOR THE DEFENDANT JOSEPH GORHAM.

JOHN J. CASEY, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is John J. Casey. I am a Captain of Police, commanding Bush Street District. I have known Sergeant Gorham for about 20 years. Prior to coming to the Bush Street Station he worked under me in the License Bureau for about five years.

(Testimony of John J. Casey.)

During that period I was the immediate head of the License Bureau. I know the general reputation of Sergeant Gorham in the community in which he resides for truth, honesty and integrity. His reputation is good. (To Mr. Taaffe.) I know Patrick Kissane, one of the defendants in this action. I have known him in the Police Department, and he has been under my direct command. I have known him for a considerable number of years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 406– 407, inc.) [367]

TESTIMONY OF HENRY R. PATTERSON, FOR THE DEFENDANT JOSEPH GORHAM.

HENRY R. PATTERSON, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Henry R. Patterson. I reside at 2031 Hayes Street, San Francisco. I am manager of the Yosemite Taxicab Company, and have been such for two years. I know Sergeant Gorham. I have known him for 15 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

R. Tr. Vol. 6, p. 407.)

TESTIMONY OF WILLIAM J. WARD, FOR THE DEFENDANT JOSEPH GORHAM.

WILLIAM J. WARD, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is William J. Ward. I reside at 75 Whitney Street, San Francisco. I am a police officer. I am attached to Company E, Bush Street Station, and have been so attached about nine or ten months. I was so attached in the months of March and April, 1924. I was in the premises 1249 Polk Street. I was there I should say about six or seven times. At the time I visited there I was acting under instructions of Sergeant Gorham, trying to purchase liquor there. I would go as far as the head of the stairs, and be told it was a private house, I was in the wrong place, or something to that effect. I know the man I met there now—that is, I know now [368] who they were who refused to serve me liquor. I was able to go to the head of the stairs of the premises. I could not say what was going on inside of the flat. I only could see the front view of the flat. I was a member of what is referred to as the special detail of Police District 5, and have been such about eight or nine months. That detail is made up of Sergeant Gorham, commanding, Officer Maguire and myself.

(Testimony of William J. Ward.)

Cross-examination.

(By Mr. GILLIS.)

The first time I visited 1249 Polk Street was the latter part of March. I could not say what time in the latter part of March, just what day. I know it was in the latter part of March, and during the month of April, I believe. I could hardly say whether it was before the 28th or after the 28th of March. I think it was about the 12th or 14th when I was detailed with Sergeant Gorham, and I imagine it was ten or fifteen days after that I went into that place. I could not say whether it was before or after the 28th for sure. I know it was in the latter part of March I was there. I don't know to my knowledge if Sergeant Gorham had been there before I went there. The first time that place was called to my attention by Sergeant Gorham was when he sent me in there to try and purchase liquor. I would not place that definitely, only the latter part of March, some time. That is the best I can do. I rang the bell. I didn't ring three bells, no specific bell, I rang one, two, every time I was there; I didn't ring any specific amount of bells. I switched the bells. The first time I believe I saw one who I have since known to be Mahoney. I tried to appear as though I was known to him, had been there before, and tried to walk past him, and I told him I wanted to get a drink, and he said, "You are in the wrong place." I got to the head of the stairs [369] and I said to him, "I want to get a drink." He said, "You are in the wrong place;

(Testimony of William J. Ward.)
no drinks here; this is a private house." He said, "This is a private house." I said—well, I told him he must be mistaken, I had been there *fore*. He said, "No, you have not; I have not seen you before; you will have to walk out." So I turned around and walked out. There were three doors that I could see in the hallway; a couple of times I was in one of the doors was open. I could not say that it was on the first visit. I don't remember whether the door was open or not. I made a report to Sergeant Gorham. He told me when I first went in if I found a violation of law or any liquor in sight, to seize it and place them under arrest. I didn't see any. I saw nothing but an empty room, with the door open. The other doors I believe were closed. The door just at the head of the stairs. I don't know how it was furnished. I could merely see in through the door. I just saw a sort of center table and a couple of chairs; that is all. I went there the next time about a week afterwards. I kind of alternated visits. He sent me up some time in the afternoon and some time in the night. The second time I believe I saw the man who I know since is Birdsall. I had seen him before. I said to him the same as I told Mahoney. I wanted to get a drink. I didn't call him by name. I didn't know who he was. Sergeant Gorham didn't tell me who was in there. He didn't tell me the name of the man who ran the joint. He merely told me it was suspected bootlegging place, to go up and try and buy a drink. He didn't tell me

(Testimony of William J. Ward.)

Birdsall was in there. He didn't tell me he had been in there and saw Birdsall. He didn't tell me that I would have any trouble getting in. All I would have to do was to make out I knew Birdsall. He told me to appear as though I had been there before and got a drink. That is all. Birdsall told me the same as Mahoney. He said, [370] "You are in the wrong place; there is no drink here; this is a private house." I don't know if he lived there. He just said it was a private house. I could not say specifically whether I saw any of the doors open on this occasion, as to each visit, whether they were open; sometimes they were open, and sometimes closed. On my visits I didn't see any of the doors open besides the one I testified to. That is the only door I ever saw open, just the one in the center. I saw that open on more than one occasion. I never saw anybody in there. I went in there to make the buy any time from 2:30 to 4:30 in the afternoon, and sometimes from 8 to 8:30 to 11. I could not give you the exact time of my visits there. I did not keep a memorandum of them. I never made any memoranda as to my visits there. I reported to Sergeant Gorham when I came out. If it was prearranged he would be across the street, where he could see the window in case I came to the window. If I did anything, walked into the room, I could see through the window. So that anybody standing in the front room could see across the street. On the occasions that I visited there those were the only two men I saw,

(Testimony of William J. Ward.)

just Birdsall and Mahoney. When I saw Mahoney or Birdsall on the second time that I went there I said words to the same effect. The visits were arranged so that they would be about a week apart, thinking they would let me in eventually. They always made the same reply to me; always the same thing. They were always in their shirt-sleeves when I was there. I was making visits to other places and getting into most of them, frequently buying drinks. This place I could not make any buy from. I went there in the afternoon, between 2:30 and 4:30, and between and around 11 at night. From 8 to 11. It might have been 4:30, perhaps 5, but I would not place it definitely as to the time.

(R. Tr., Vol. 6, pp. 407–413, inc.) [371]

Thereupon the defendants Gorham, Marron, Birdsall, Mahoney and Kissane announced that they rest their cases.

TESTIMONY OF C. S. MATTHEWSON, FOR THE GOVERNMENT (IN REBUTTAL).

C. S. MATTHEWSON, a witness called for the United States, in rebuttal, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am in the undertaking business at 1550 California Street. I know Mr. Brand, one of the defendants in this case. I am vice-president and general manager of the company. He has been around the firm during the year 1924. He hasn't really been

(Testimony of C. S. Matthewson.)

working there,—that is, he has been helping out in a way, of his own accord. He has been there for several months. He has drawn no real salary. I have not paid him any commission within the last five or six months, that I can recall. During the year 1924 he had a couple of deaths in his family, I believe his sister-in-law, or a nephew, and a child of one of the relatives, and I believe I allowed him $75, that is, as a sort of discount. That is the only money that I can recall, outside of Thanksgiving I gave him a little, a few dollars for a turkey, and Christmas a few dollars, that is all. He has been there pretty regularly; in the neighborhood of four or five months he has been regular. Up to four or five months ago he didn't work regularly every day, all day long. I didn't keep any regular track of the time he spent each week there. He would come and go. I myself didn't keep any record of his time, because he was not on the regular pay-roll. He has been very regular for the last four or five months. He has been off [372] occasionally, no, hardly ever, with the exception of Sundays.

Cross-examination.

(By Mr. GREEN.)

We have an embalmer working for us as an employee by the name of Hill. He would be more likely to know the exact hours that Brand has spent there than I would, because they were together continuously.

(R. Tr., Vol. 6, pp. 413–415, inc.)

TESTIMONY OF WILLIAM KENLY LATHAM, FOR THE GOVERNMENT (IN REBUTTAL).

WILLIAM KENLY LATHAM, a witness called for the United States in rebuttal, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

Q. You have already been sworn in this case, Mr. Latham? Mr. Latham, did you visit 1249 Polk Street the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what?

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249, so there is nothing [373] to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

(Testimony of William Kenly Latham.)

Q. Do you remember about when that was, approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it.

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections, and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time, who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

(Testimony of William Kenly Latham.)

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir. [374]

Q. That would be the side near the Judge's bench?

A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mr. Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out?

(Testimony of William Kenly Latham.)

A. I poured out some, myself.

Q. That was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose [375] of getting a drink, and I went out.

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

Q. Near the kitchen, was it? A. Yes, sir.

(Testimony of William Kenly Latham.)

Q. Now, from the conversation that occurred between Gorham and Mahoney, did it appear to you that they knew each other, and were on friendly terms, or otherwise?

Mr. TAAFFE—That is objected to as calling for the conclusion of the witness.

Mr. GILLIS.—Just how it appeared to him.

The COURT.—Better put it, what was the nature of the relations, as you observed it?

A. Well, they spoke to each other; as to what they said, I couldn't recall.

The COURT.—Q. You mean that Sergeant Gorham there came into the kitchen when you were drinking there, and he was talking with Mahoney?

A. I do.

The COURT.—Go ahead.

Mr. GILLIS.—Q. Did Gorham stay in there for a few minutes

A. To the best of my recollection, I left him there. I went right out and went down the stairs. [376]

Q. After you had had your drink?

A. Yes sir.

Q. Your drink—you poured your drink while he was there? A. Yes, sir.

Mr. GILLIS.—That is all.

Cross-examination.

(By Mr. KELLY.)

This date was the latter part of September. I couldn't give the exact date. I couldn't give you the approximate date. The best way I can put

(Testimony of William Kenly Latham.)

it down, it was the latter part of September. That is the best I could give you. I could not give you the exact time, because I didn't pay any attention to the date. It was in the forenoon. I should judge around 11 o'clock, maybe half-past 11. I could not fix any more definitely than the latter part of September. That is the only time I have seen him in there. I was first subpoenaed to testify in this matter for the Government yesterday afternoon. I was a witness here before testifying to the character of Kissane, and it was after that that I was subpoenaed to give the testimony that I am now giving. I didn't make any admissions that I had been drinking in the place until a few moments ago. I am a stationer out there. My place is 1550 Polk Street, near California. Sergeant Gorham had on a light suit of clothes. He was not in uniform.

(R. Tr., Vol.—, pp. 416–421, inc.)

Thereupon the Government announced that it rest its case. [377]

TESTIMONY OF JOSEPH GORHAM, IN HIS OWN BEHALF (RECALLED IN SURREBUTTAL),

JOSEPH GORHAM, recalled as a witness on his own behalf, in surrebuttal, testified as follows:

Direct Examination.

(By Mr. KELLY.)

I heard the testimony of the witness who has

(Testimony of Joseph Gorham.)

just left the stand. I had never seen him before until yesterday. I heard him state that I was in the kitchen at 1249 Polk Street on a date that he fixed in the latter part of September, at about 11 o'clock in the morning, and that he in my presence poured out gin and drank it, and that at the same time in the presence of Mr. Mahoney. That statement is untrue. My vacation period was from the 2d to the 16th of September. My days off were the 1st to the 17th. I was off the first 17 days of September. I came back to work on the 18th. From the 18th, when I came back to work, until the latter part of September, I was not in that place. My usual routine duties in the morning hours of my watch have been in the police court every morning at 10:30, practically every morning that I have been detailed in that company. On an average of about 200 arrests a month, attending to the complaints and arrests made by me. That was throughout the month of September, as with every other month during my detail. The day I wouldn't be in the Police Court would be an exceptional day. I testified when I was on the stand before that the purpose of my visits to the place was to determine whether any violations of the law had been committed in there. If instances had occurred I would certainly have effected an arrest. If I saw the instance depicted by the witness Latham I would have made an arrest. [378]

(Testimony of Joseph Gorham.)

Cross-examination.

(By Mr. GILLIS.)

During the period of seven months I don't think there were ten days that I was not in the Police Court. I would say that there were days, however, when I was not in the Police Court, but very few.

Mr. KELLY.—Prior to Mr. Taaffe's addressing the Court, I move the Court, on behalf of the defendant, Joseph Gorham, for a directed verdict on the ground that the evidence is insufficient as a matter of law to sustain a contrary verdict.

The COURT.—I think the situation is stronger against you than it was before. The motion is denied.

Mr. KELLY.—Note an exception.

(R. Tr. Vol. —, pp. 421–423, inc.)

Mr. TAAFFE.—May it please your Honor, on behalf of the defendant Kissane, we renew the motion which we before made, for an instructed verdict of Not Guilty, or an advised verdict or whatever procedure there is in reference to that, and we also wish to make the motion, if the Court please to exclude all the testimony that has been offered by the Government, with regard to the connection of the defendant Kissane to this matter, in any way, shape or form; and I would like, if the Court pleases, an opportunity to briefly present it.

The COURT.—Mr. Taaffe, I wouldn't take any time over that. I am satisfied, I have studied the matter very carefully, I am satisfied it is a matter for the jury. You couldn't change me on that. The motion is denied.

Mr. TAAFFE.—I would be only about two minutes.

The COURT.—Well, go ahead. Be as brief as you can.

Mr. TAAFFE.—Does your Honor wish this argument to be made in the presence of the jury?

The COURT.—Whichever you prefer. You may step outside.

(The jury then withdrew from the courtroom.)

The COURT.—I will deny the motion.

Mr. TAAFFE.—I will take an exception. [379]

Thereupon, counsel for the Government and counsel for the defendants announced that they had *rest* their cases.

The above constitutes all the evidence, oral and documentary, introduced and admitted by the Court on behalf of the United States and on behalf of the defendants.

Thereafter the case was argued by the attorneys for the United States and by the attorneys for the defendants.

Thereupon, the Court charged the jury as follows: [380]

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen: The Court wants to add its thanks to those which have been given to you by counsel on both sides for your attention in this matter. It is by no means pleasant to the Judges of this court to keep business men away from their duties for so long a period of time; but in this particular case I think that you realize that necessarily the matter is of supreme importance; I say "supreme importance," for the very simple reason that it involves the whole question of the enforcement of a statute which is the subject of conversation and controversy at every fireside, and every dinner table throughout

the length and breadth of the land. That necessarily leads me to warn you again, as I have so often done, that you are the sole and exclusive judges of the facts of this case, that your function and the function of the court are entirely separate and distinct. I have no desire, nor is it a part of my duty, to do anything more than to lay down to you, in the best manner in which I am advised, what I conceive to be the law of the case. When I have done that, my duty is at an end, and then it is for you to determine what the facts are, and, having determined those facts, determine in your minds whether under that law they are sufficient to bring in a verdict either of guilty or not guilty against each one of these defendants.

If, during the course of the trial, there has been anything said by the Court, either in passing upon or ruling upon any question of evidence, objection or motion, or if hereafter, in discussing certain phases of the evidence and its applicability to the law of the case, I shall say anything about it, I want you to understand that in no manner, shape or form, do I mean to intimate [381] anything whatsoever as to the credibility of any witness, or the truth or falsity of anything that has been sworn to; that is, for you to determine, and I am satisfied that you will give all matters that have been presented to you here from the lips of the witnesses, and documentary evidence, such consideration as the importance of the case to the people of this State and the United States, and to these defendants, seems to warrant.

The Grand Jury of this district has presented here an indictment against seven defendants. One of them, Hawkins, has never been apprehended, and, of course, you do not have to find any verdict as to him. As to the other six, however, you must find each one of them either guilty or not guilty of the charge. The indictment, however, gentlemen, as I have so often explained to you, is not in any manner to be taken by you as any evidence in the slightest degree of the guilt of these defendants. The indictment is the mere form by which, under the constitution and laws of the United States, a charge is presented against a citizen for investigation by the Court, and for final determination by a trial jury of his own selection. Therefore, you are not in any manner to consider it as any evidence whatever that these men are guilty. On the contrary, as I have so often explained to you, these men, in spite of the indictment, stand before you, at the outset of the trial, clothed with the presumption of innocence; that presumption accompanies them, gentlemen, throughout all of the stages of the trial, until the last juror has given his last ballot in the jury-room. It is not a mere form of speach, nor a fiction of law, but it is a real thing, fundamental under our constitution, that any man charged with crime is presumed to be innocent. That presumption, gentlemen, can only be removed by evidence which satisfies your minds upon every material point to a moral certainty and beyond all [382] reasonable doubt.

A moral certainty means that evidence must be presented of a character and to a degree and in quantity which would ordinarily produce conviction in an unprejudiced mind.

A reasonable doubt means exactly what the term "reasonable doubt" implies, that is to say, it is the kind of doubt which would influence you in the most important affairs of your own lives.

These men are charged with a conspiracy; they are charged with having entered into a combination, confederation or conspiracy to bring about a violation of the so-called National Prohibition Act; but, mark this, gentlemen, they are not charged with a violation of the National Prohibition Act, and however much you may be convinced from the evidence that these defendants, or any of them, or all of them may have violated, even time and again, the National Prohibition Act, they are not to be convicted on that, because they are not on trial for that, but only for a conspiracy.

Now, then, conspiracy, as such, is made a crime by statute of the United States long in existence, known as Section 37 of the Criminal Code of the United States. Something has been said here in argument to the effect that it was never the intention of Congress that men who had violated the National Prohibition Act should be charged under this section. In the first place, gentlemen, you and I are bound to find the intention of Congress from its enactments, and not from the arguments of counsel, or what one person or individual may

think about it. Congress has declared in so many words, as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties [383] do any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty," etc.

"A conspiracy is formed when two or more persons agree to do an unlawful act; in other words, when they combine to accomplish, by their United action, a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means; and the offense is complete when one or more of the parties so agreeing together does any act to effect the object of the conspiracy.

"To constitute a conspiracy, it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words, or in writing, state what the unlawful scheme is to be, or the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, come to a mutual understanding to accomplish the common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in furtherance of the

unlawful scheme, such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one, or is to be executed at a remote distance from the other conspirators.

"In determining the question of the existence of a conspiracy, you will take into consideration the relation of the parties to one another, their personal and business association with each other, and all the facts in evidence that tend to show what transpired between them at and before the time of the alleged combination, as well as the acts performed by each party subsequent to such alleged combination in respect to the subject matter of the [384] alleged conspiracy.

"A conspiracy is rarely, if ever, proved by positive testimony. When a crime is about to be committed by a combination of individuals, they do not act openly, but covertly and secretly. The purpose of the combination is known only to those who enter into it, and their guilt can generally be proved only by circumstantial evidence. The common design is of the essence of the charge, and this may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.

"To constitute the offense of conspiracy which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the

conspiracy to effect its object. So, if you should find that the defendants, or some of them, conspired together, as charged in the indictment, to commit the offense, you will then inquire whether the defendants, or either of them, did any of the acts charged in the indictment as constituting acts to effect the object of the conspiracy.

"The act must be one, you will observe, to effect the object of the conspiracy. It must not be one of a series of acts constituting the agreement, or the conspiring together, but it must be a subsequent, independent act, following a completed agreement, and done to carry into effect the object of the combination. Such acts constitute what are known as overt acts in the law of conspiracy.

"If you find that a conspiracy existed, as alleged in the indictment, and that some one or more of the overt acts were committed, as alleged, the question then follows: Were the defendants [385] on trial, or some of them, connected with that conspiracy as parties thereto? Mere passive knowledge of the illegal action of others is not sufficient to show complicity in the conspiracy. Some active participation is necessary. Co-operation in some form must be shown. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose. To establish the connection of either of the defendants with the conspiracy, such connection must be shown by facts or circumstances, independent of the declarations of others; that is, by his own acts, conduct or declarations. And, until

this fact is thus established, he is not bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and the defendant is shown by independent evidence to be a party thereto, then he is bound by the acts, declarations and statements of his co-conspirators done and made in furtherance of the conspiracy.

"So, in considering the testimony given as to the acts, declarations and statements of either one of the defendants when other defendants were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements or communications, were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence; and that, when once that connection is thus shown, then he becomes affected and bounded by the declarations and acts of other parties to the conspiracy, if any, made and done in furtherance of the common enterprise, and during his connection therewith. [386]

"The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons to commit

crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinct from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose, in proportion to the numbers, power, and strength of the combination to effect it. It is also true that it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and as a consequence, to the safety of the community in which they belong.

Now, gentlemen, there are five persons here who are charged with this conspiracy.

Mr. O'CONNOR.—Six, if your Honor please.

The COURT.—Six persons, one of whom, however, is not on trial.

Mr. O'CONNOR.—There are on trial six defendants.

The COURT.—There are seven persons charged, one of whom is not on trial. There are six persons, therefore, concerning whom you must determine their guilt or innocence.

Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or

character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1000 to Mr. Brand, without knowledge of the purpose for which it was to be used, and that after Mr. [387] Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of a business in violation of the National Prohibition Act, then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

Likewise, if you should find from the evidence that even if the original loan was without knowledge or understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand by Mr. Marron after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by

Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy.

So far as the defendants Marron, Mahoney and Birdsall are concerned, if you find from the evidence that those three defendants participated together in any manner in the conduct of a business at 1249 Polk Street, for the sale of intoxicating liquor as a beverage, then I instruct you that that would constitute a conspiracy as I have heretofore defined it to you. [388]

If you find that the defendants Marron and Birdsall had any sort of an agreement, either by which Mr. Marron was to receive the entire profits and pay to Mr. Birdsall the sum of $20 a day, or if you should find that their agreement was, or that their understanding was, either express or implied, that Mr. Birdsall should receive $20 a day, and Mr. Marron certain other money per month, and then the profits were to be divided, that would constitute a conspiracy as between those two.

So far as the defendant Mahoney is concerned, if you find from the evidence that he was engaged as a bartender there, and had received therefor a compensation, and that he knowingly entered into the sale of the liquor at that place for the purpose of providing the profit for either Mr. Marron or Mr. Birdsall, I instruct you that Mr. Mahoney is equally guilty of a conspiracy with Mr. Birdsall and Mr. Marron.

Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one on Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you that these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy.

There has been admitted in evidence here a statement made by [389] the defendant Brand to some of the officers of the law. That statement was made after October 3d, and I instruct you, gentlemen, that for the purposes of this case, if there was a conspiracy that conspiracy ended on the 3d of October, and, therefore, the statement made by Mr. Brand, after October 3d, to the officers of the law, is evidence against Mr. Brand alone, and cannot be considered by you with reference to any of the other defendants.

There was also a statement made to Mr. Oftedal by Mr. Mahoney after the 3d of October. That statement, gentlemen, can be considered by you only as evidence against the defendant Mahoney,

and not as evidence against any of the other defendants.

However, there is a clear and sharp distinction that you must keep in mind concerning statements made before October 3d, and those made after October 3d, because the law, gentlemen, is clear, as enunciated in the part that I read to you, that any statement made or any act done by any one of the persons who you may find were parties to the conspiracy, and before the end of the conspiracy, is binding upon all of them and may be considered by you as evidence against all of them. On the contrary, anything said or done by any one of them after the conspiracy has ended is not binding upon anyone except the person who did it or said it. I should qualify, however, the statement or the instruction, that statements made before the end of the conspiracy are binding upon all in this manner, that they must be statements made or things done in furtherance of the conspiracy.

I come now, gentlemen, to the two police defendants. Congress, by the necessary two-thirds, declared and adopted the Eighteenth Amendment to the Constitution of the United States. [390] That amendment, as the Constitution itself specifically provides, was, of course, of no force or effect until it had been submitted to the legislature of three-quarters of the States. That was done, and more than three-quarters of the States of the Union, including the State of California, ratified and confirmed that amendment, and thus, by automatic provisions of our fundamental law, it has become a part

of *the* binding upon every citizen, the length and breadth of the land. That amendment to the Constitution provides by its terms, not only that the duty is devolved upon Congress to pass a statute to carry out the intent and purposes of that amendment, but likewise it provides that the States, themselves, might, by the adoption of local statute, provide for carrying it into effect. Accordingly, the legislature of the State of California passed a statute adopting *in toto* the National Prohibition Act, familiarly known as the Volstead Act, with all of its inhibition and exceptions, and all its pains and penalties. That statute thus passed by the legislature, was submitted to the vote of the people of the State of California, under our constitutional provision for a referendum, and a majority of the people of the State of California voted in favor of that statute, by which the Volstead Act was adopted as a part and parcel of our own set of laws. Of course, the great majority of men are opposed to larceny, but, unfortunately, there is a small minority who will steal. A great majority of men and women are opposed to forgery, but there is still a small minority who will sign other people's names to checks. As to this particular statute, there is not only a minority, great in number, but there is a minority respectable and convinced and believing that it ought never to have been the law, and frequently considering themselves aggrieved [391] to the fullest extent by the fact that it ever became a law. But, gentlemen, these considerations, which are proper enough for the rostrum of the legislative

hall, for private propaganda against this law, can find no room for so much as an echo in this place. Here our duty is plain. We have taken an oath to do that duty, and to support the Constitution of the United States, and we would be false and recreant to that duty if we did not do it according to the law.

Now, that statute, passed by the State of California, to say nothing of the statute of the United States, places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and, where he finds that persons are transgressing it, to see that they are arrested and prosecuted in accordance with that statute and the statute of our Congress. In considering, therefore, the case of these two police officers you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against, your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest if they found any person transgressing it. I do not mean by that, and you are to keep this distinction carefully in mind, that any man can be held guilty of conspiracy because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigation by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or even mere shutting a man's eyes to a violation of the law, would not constitute

him a conspirator; but if, on the other hand, he knew that the law [392] was being violated, and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation therefor or not. You are to determine, therefore, gentlemen, from all of the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy, bearing in mind, however, that mere carelessness or negligence on their part in enforcing the law would not be sufficient to constitute them conspirators. In considering the question, gentlemen, you are entitled to consider all of the evidence presented here by the Government, such as the reports made by these two officers in regard to the number of times that they visited that place; you are to take into consideration its proximity, if you find it to be so, to the place where they had their headquarters; you are to take into consideration, if you find it to be a fact, the large quantity of liquor that must have been taken into the place, the large number of persons, if you find that there was a large number, who visited the place, and all of the facts and circumstances which you think may bear

upon the question as to whether or not there was any understanding between the officers and the other persons, that this place should be allowed to run without molestation.

The defendants Patrolman Kissane and Sergeant Gorham, have taken the stand in their own behalf, and have positively denied [393] that they permitted that place to run, or that they had it within their power to stop it if they had wanted to. Under our system of law they were entitled to take the stand in their own behalf, and you are to give to their testimony, gentlemen, the same consideration that you would the testimony of any other witness; that is to say, you must weigh their testimony and determine their credibilty from their appearance, their manner on the stand, whether or not their testimony is consistent in itself, consistent with the other facts of the case, or any admissions or documents that may have been presented to you; of course, bearing in mind that they have an interest in the outcome of the case.

The same consideration applies to the defendant Brand.

The other defendants, however, have not taken the stand in their own behalf. Under our system of laws, that is absolutely their privilege. No man need take the stand in his own behalf, unless he so desires, and not the slightest inference is to be drawn by you against these defendants, from the fact that they did not take the stand; in other words, you are to dismiss that matter entirely and absolutely from your minds.

Now, gentlemen, I come to this so-called little gray book. If you find from the evidence the first part of that book was kept by the defendant Brand, you may consider anything that you may find in it as evidence against him, that is, in the first part of it, against him, and against him alone. If, however, you should find that the defendant Marron in any manner participated or insisted upon the keeping of that book, or entered into any of the profits as shown by that book, then you may consider that first part, I think it is the first 34 pages, also as against the defendant Marron.

I come now to the second part of the book, or that part which Mr. Heinrich testified was in the handwriting of the defendant [394] Marron. If you find that that book was kept by the defendant Marron from page 34 on, then you may consider the entries in that book from that page on as evidence against him.

Now, gentlemen, there occur in that book, as shown by the exhibit which was on the board yesterday, various entries with regard to the defendants Kissane and Gorham. At the very outset you must determine whether or not the Kissane mentioned in that book is the Kissane who is a defendant here. Of course, if you are not satisfied to a moral certainty and beyond a reasonable doubt that it refers to the same Kissane who is here, you will not consider it at all. Upon the other hand, if you do find the Kissane on trial here is the same person mentioned in that book, then the instructions which I will give you later will apply. The same thing as

to the defendant Gorham. If you determine from the evidence that some other Gorham is meant, you will not consider it at all.

Now then, as I have read to you heretofore, the statements of a co-conspirator are evidence against those persons associated with him in the conspiracy only after a conspiracy has been established. If you should find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise, for these two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of the place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things, first, [395] that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in regular course of business as showing as a part of the expenses the payment of money to these officers; and, third, if you find that there was any tacit or other understanding that that place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of the defendants Gorham and Kissane, or either of them.

The term "reasonable doubt," gentlemen, is not a mere figure of speech, nor is it to be lightly looked upon by the jury. The right of a defendant charged with a crime to have his guilt established to a moral certainty and beyond a reasonable doubt is a substantial right, given by law, which must be respected by courts and juries.

If two inferences can be drawn from a given act or circumstance, or from any number of given acts or circumstances, one inference being that of guilt and the other that of innocence, it is your duty to draw the inference of innocence and not that of guilt.

Much of the evidence here has necessarily been circumstantial. The law in regard to circumstantial evidence is as follows: In order to justify a jury in finding a verdict of guilty based upon circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and, therefore, render probable the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt every other hypothesis except the single one of guilt, or the jury must find the defendants not guilty. [396] That, of course, however, gentlemen, does not mean that men may not be convicted on circumstantial evidence. Very frequently circumstances speak stronger than any pos-

sible evidence that could fall from the lips of witnesses, and in accordance with these instructions, it is for you to determine calmly, dispassionately, and with no feeling whatsoever, either of sympathy for the defendants, or, on the other hand, of any rancor or prejudice of any kind against them, whether or not in your opinion the facts as produced here are sufficient to a moral certainty and beyond a reasonable doubt to convince you of their guilt.

It requires, gentlemen, an unanimous verdict at your hands. [397]

That the defendants Marron and Birdsall then requested the Court to give their instructions Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 29, 30, 31, 35 and 36.

That said instructions were and are in the following words and figures, to wit:

INSTRUCTION No. I.

Gentlemen of the Jury, I charge you that as to the defendant George L. Birdsall, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant George L. Birdsall.

INSTRUCTION No. III.

Gentlemen of the Jury, I charge you that as to the defendant Joseph E. Marron, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant Joseph E. Marron.

INSTRUCTION No. XII.

Mere probabilities, much less possibilities, conjectures and suspicions, are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the testimony supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that a defendant is guilty.

INSTRUCTION No. XVI.

The defendants are, and each of them is, clothed with the presumption of good character and this presumption of good character is a right to which they are, and each of them is, entitled, and of which they, or any of them, cannot be deprived under the law until guilty intent is established to a moral certainty and beyond all reasonable doubt. [398]

INSTRUCTION No. XVII.

The defendants in this case are entitled to the independent judgment of each and every juror who has been selected to try them. It is one of the fundamental principles of this government, a principle that has been adopted for the protection of the people that twelve men shall constitute a jury and that no man may be convicted of any offense unless the judgment of each and all of such twelve men shall concur in the conviction that to a moral certainty and beyond every reasonable doubt the defendant is guilty of the offense charged against him. If, therefore, any one or any number of you, after carefully deliberating upon the evidence

in this case, under the instructions of the court, shall be of the opinion that the defendants have not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those jurors entertaining such opinion should vote in favor of acquittal and should adhere to that opinion until convinced beyond reasonable doubt that such opinion is wrong, and they should not be convinced by the mere fact that the majority of the jury differ from them in opinion.

INSTRUCTION No. XVIII.

One individual alone cannot be guilty of a conspiracy. The conspiracy must be proven to a moral certainty and beyond a reasonable doubt, against two or more of the alleged conspirators, to justify a verdict of guilty. If, therefore, the evidence does not show, to a moral certainty and beyond a reasonable doubt, that any two or more of the defendants did enter into the conspiracy alleged in the felony indictment, your verdict must be not guilty [399] as to all of the defendants.

INSTRUCTION No. XXIII.

I instruct you, gentlemen, that expert witnesses are generally but ready advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed, and, as a matter of course, no expert is called until the party calling him is

assured that his opinion will be favorable. *Such evidence should be received with great caution by the jury.*

(Gribsby vs. Clear Lake Water Co., 40 Cal. at page 405.)

INSTRUCTION No. XXIV.

The testimony of experts is by no means conclusive and when offered cannot prevent the jury from comparing the documents with a view to question their similarity and it may wholly disregard their testimony and exercise its own judgment.

(Castor vs. Bernstein, 2 Cal. App. 704.)

INSTRUCTION No. *XVI.*

I charge you that before you can find the defendant George L. Birdsall guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him. [400]

INSTRUCTION No. XXVII.

I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

INSTRUCTION No. XXIX.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore, if you find that the defendant Charles Mahoney knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Charles Mahoney took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty.

INSTRUCTION No. XXX.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Joseph E. Marron took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty. [401]

INSTRUCTION No. XXXI.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if you find that the defendant George L. Birdsall knew that this conspiracy was in being but did not

participate therein you must find him not guilty. Likewise if you find that George L. Birdsall took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty.

INSTRUCTION No. XXXV.

The defendants are not on trial for violating any provisions of the National Prohibition Act but for conspiring to violate the National Prohibition Act.

Particular violations of the National Prohibition Act are therefore not sufficient of themselves to warrant a conviction.

You must be convinced beyond all reasonable doubt that in addition to any particular violations of the National Prohibition Act that were committed, if there were any so committed, there was in actual fact a conspiracy in existence at the time said acts were so committed.

Particular violations of the National Prohibition Act may, if the circumstances in your opinion warrant, be considered as evidence tending to show such conspiracy, but the inference that there was in reality a conspiracy must be so cogent and compelling when all the evidence is considered as to convince you beyond a reasonable doubt that such conspiracy did actually and in fact exist prior to the commission of National Prohibition Act violations, [402] otherwise your verdict as to the defendants Marron, Birdsall and Mahoney must be not guilty.

INSTRUCTION No. XXXVI.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant or defendants on trial in the cause in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to convict the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient it if merely shows the commission of the offense or the circumstances thereof.

That the Court refused to give said instructions, or any of them, to which refusal the defendants Marron and Birdsall then and there noted an exception.

That the defendants Marron and Birdsall excepted to that part or portion of the charge of the Court to the jury as follows, to wit:

"Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1,000 to Mr. Brand, without knowledge [403] of

the purpose for which it was to be used, and that after Mr. Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of a business in violation of the National Prohibition Act, then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

"Likewise, if you should find from the evidence that even if the original loan was without knowledge or understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand by Mr. Marron after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy."

The defendant Kissane then and there excepted

to that part or portion of the charge of the Court to the jury with reference to tacit acquiescence, which said part or portion. [404]

That the defendants Marron and Birdsall excepted to that portion of the charge of the Court to the jury as follows, to wit:

"Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one on Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy." [405]

of said charge was and is as follows, to wit:

"But if, on the other hand, he knew that the law was being violated, and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation therefor or not. You are to determine, therefore, gentlemen, from all of the facts

and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purposes of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy.

That defendant Kissane requested the Court to give his instructions Nos. 2, 3 and 4, which said instructions are as follows:

INSTRUCTION No. II.

You are further instructed that in considering the evidence introduced, in order to determine whether or not a conspiracy was in existence between the defendants on trial here, to violate the terms, conditions and provisions of the Volstead Act, and whether or not the defendants Patrick Kissane and Joseph Gorham conspired with each other and with the other defendants on trial here to effect and consummate the objects of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked [406] "Government's Exhibit in evidence Number 3" and give no consideration to the entries therein contained, unless from the evidence introduced, exclusive of the evidence contained in said Exhibit Number 3, you are convinced to a moral certainty and beyond a reasonable doubt that a conspiracy existed between all of the defendants to do the acts charged in said indictments.

INSTRUCTION No. III.

The defendant Patrick Kissane is a police officer and as to public offenses of the degree of misdemeanors he has no authority to make arrests unless armed with a warrant save and except in those cases where the offense is committed in his presence.

(Ferguson vs. Superior Court, 26 Cal. App. 554.)

INSTRUCTION No. IV.

While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting the proprietor or visitors thereof does not constitute a neglect of his official duty.

(Ferguson vs. Superior Court, *supra.*)

That the Court refused to give said instructions, or any of them, to which refusal the defendant Kissane then and there noted an exception.

That the defendant Gorham requested the Court to give his instruction No. I, which instruction is as follows: [407]

INSTRUCTION No. I.

I instruct you that the evidence in this case is insufficient as a matter of law to warrant a conviction of the defendant Gorham, and you are therefore instructed to return a verdict of not guilty as to the defendant Gorham.

That the Court refused to give said instruction,

to which refusal the defendant Gorham then and there noted an exception.

That after the Court had completed its charge to the jury, the jury retired to deliberate upon its verdict, and thereafter brought in a verdict as follows:

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

VERDICT.

We, the Jury, find as to the defendants at the bar as follows:

Walter Brand—Not Guilty.

Charles Mahoney—Guilty, with a recommendation that leniency be shown and a fine only imposed.

Joseph E. Marron—Guilty.

George Birdsall—Guilty.

Patrick Kissane—Guilty.

Joseph Gorham—Guilty.

_____,

Foreman.

[Endorsed]: Filed January 13, 1925, at —— o'clock and —— minutes —— M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [408]

Thereupon, and at said time, the attorney for Joseph Gorham presented to the Court a motion for a new trial on behalf of the defendant Joseph Gorham, and an affidavit and documentary evidence in support thereof, which said motion, affidavit and documentary evidence were and are in the following words and figures, to wit:

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

MOTION FOR A NEW TRIAL OF DEFENDANT JOSEPH GORHAM.

Now comes the defendant, Joseph Gorham, and moves the Court that the verdict herein rendered be vacated and a new trial be granted said defendant for the following reasons:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of the evidence.

3. That the verdict was contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing instruction No. I, requested by the defendant Gorham.

5. That the Court erred in admitting evidence contrary to the law.

6. That newly discovered and material evidence has come to light since the trial.

7. Errors of law occurring at the trial, and which errors of law defendant Gorham regularly and [409] *and* duly excepted to.

8. That new evidence material to defendant Gorham has been discovered, which he could not with due and reasonable diligence, produce at the trial.

WHEREFORE, defendant Gorham respectfully prays this Honorable Court that the verdict herein rendered be set aside and that a new trial be allowed.

WILLIAM A. KELLY,
Attorney for Defendant Joseph Gorham.

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

AFFIDAVIT OF DEFENDANT JOSEPH GORHAM IN SUPPORT OF MOTION FOR A NEW TRIAL.

State of California,
City and County of San Francisco,—ss.

Joseph Gorham, being first duly sworn, deposes and *and* says:

My name is Joseph Gorham. I am one of the defendants in the above-entitled proceeding. I am and have been for a number of years past, a Sergeant of Police in the Police Department of the City and County of San Francisco, State of California. I was off duty in said Police Department the first seventeen days of September, 1924. I reported back to duty in said Department on the 18th day of September, 1924. Said seventeen days comprehend my regular days off and my vacation period. My vacation period was spent in Richardson [410] Springs, California, Marysville, California, and Sacramento, California.

I was not at any time during the month of September, 1924, in the premises referred to throughout the testimony in this case, 1249 Polk Street, San Francisco, California. I do not know the witness Latham, who testified during the last few moments of the trial of this case. I never saw him before he appeared as a witness in this Court. I was not in his presence at or about 11 or 11:30 o'clock on any day in the latter part of September, 1924, at said 1249 Polk Street, or at any other time

of any day in September, 1924. I was not in the kitchen of said 1249 Polk Street on any day in the latter part of September, 1924, at or about 11 or 11:30 of such day or on any day at any time of any day of September, 1924, nor was I ever in said kitchen at any time in my life. I did not witness the transaction testified to by said Latham, to wit, the pouring of liquor by said Latham into a glass, the drinking of same by said Latham and the payment by said Latham to one Mahoney, of money therefor.

I was on duty in said Police Department on every day in September, 1924, from the 18th day thereof, to and including the last day thereof. I was in the various Police Courts of the City and County of San Francisco, State of California, on all of the days of September, 1924, commencing with the 18th day thereof, down to and including the last day thereof in connection with the prosecution of cases of defendants arrested by myself and posse, to wit: Officers Maguire and Ward, excepting on the 21st and 28th days of September, 1924, which days were Sundays. I arrived at said Police Court on each of [411] *of* said days at about 10:30 A. M. thereof, and did not leave the same on any of said days until at least 12 M. of said days and often at a later hour.

Following are the records of arrests made by myself and said posse and the dates whereon in connection therewith I was as aforesaid in said Police Courts of said city and county of San Francisco:

"Sept.

18th: Jean Clark, 635 Larkin Street, keeping a house of ill fame and vagrancy.

Ester Sullivan, #635 Larkin Street, inmate of a house of ill fame.

Benjamin Burke, John Nelson, Fred Brown and Thomas O'Hara, visitors to a house of ill fame. Police Court Dept. #1—Judge O'Brien.

Jacquelini Brown (Colored) soliciting prostitution and vagrancy. Geary and Webster Streets, continued until September 25th, 1924. Police Court Dept. #1—Judge O'Brien.

Sept.

19th: Edna Petroza, #213 Elm Avenue, keeping a house of ill fame. Jess Garcia, #213 Elm Avenue, violating the pimping law and Section 476 Penal Code.

William Strong, #213 Elm Avenue, violating the pimping law and contributing to the delinquency of a minor. Police Court Dept. #1—Judge O'Brien.

20th: Margaret Norton, 1548 Market Street, keeping a house of ill fame. Inmate of a house of ill fame and vagrancy.

Helen Hayes, 1548 Market Street, inmate of a house of ill fame and vagrancy.

John Brown and Joseph McKay. Visitors to a house of ill fame—Police Court Dept. #1—Judge O'Brien.

22nd: Helen Hilton, 617 Ellis Street. Keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

May Morris, Golden Gate Avenue and Hyde St., soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

22nd: Harold Cabot, 1051 Post Street. Violating the State Prohibition Act. (Sale and possession.) Police Court Dept. #2—Judge Lazarus. [412]

Alfred Bishop, 1724 Fillmore Street, keeping a gambling place. Claude Berton, Jack Allen, Herman Offenbach, Robert Zemon, Harold Sydelman, Harry Goldman, George Bates, Ed. Miller, William Perry, Raymond Meehan, Frank White, Joseph Brown, Arthur Hyatt, Frank Deliss, Harvey Burton, Andrew J. Whitman and Antone Sanders, visitors to a gambling place. Police Court Dept. #2—Judge Lazarus.

23rd: Ethel Davis, 602 Golden Gate Avenue, keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

Ethel Weldon, 1708 Webster Street. Keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Margaret Norton, 1548 Market Street, keeping a house of ill fame, soliciting prostitu-

tion and vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Marie Devon, 381 Turk Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

25th: Jacqueline Brown (Colored) Geary and Webster Streets, soliciting prostitution and vagrancy. Continued from Sept. 18th, 1924. Police Court Dept. #1—Judge O'Brien.

25th: Ethel Waldon, 1708 Webster Street, keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

26th: Frances Lee, Ellis and Webster Streets, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Helen Williams, 802a McAllister Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Andree Miller, 1764 Geary Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Rudolph Durant, visitor to a house of ill fame. Police Court Dept. #1—Judge O'Brien.

29th: Eva Stewart, 525 Leavenworth Street. Soliciting prostitution and vagrancy. Herman King, visiting a house of ill fame. Police Court Dept. #1—Judge O'Brien.

29th: Henry Shimiza, Phillip Moore and D. Ispirito, 1623 Buchannan Street, keepers of a gambling place. Tifoles Gonzales, Jimmie Inajaki, Peter Miner, Tom Yama, M. Cortez, Yama Nihi, Exlogio Ramez, Charles Wong, Frank Chan, Sam Toda, Yosiho Yoshido, Henry Maria, Frank Toda, M. Igachi, H. Haya, Pon Ciano, Romelo Castro, Frank Rapado and I. Mori, Bill Lomioc, Pedro Lopez, D. Shimiza, Ed. Agawin, N. Bon, visitors to a gambling place. Police Court Dept. #4—Judge Jacks. [413]

29th: Thomas Gillen and Harry Levos, *alias* Henry Lewis, 1137 Fillmore Street, violating State Poison Law. Rebooked and tried on September 30th, 1924. Police Court Dept. #4—Judge Jacks.

Last two cases on September 29th, 1924, continued to September 30th, 1924, upon which last-mentioned date they were disposed of.

On said Sundays, to wit, September 21st and September 28th, 1924, I did not report to the Bush Street Police Station, the station to which I was in said month of September, assigned, until about 2 P. M. of said days.

I reside at 1132 Masonic Avenue, in the city and county of San Francisco, State of California, and on said Sundays remained in my house all morning until about 12 M. of said Sundays, whereupon I attended religious services and after said religious services, returned to my home, remained there for

a brief period and then went to said Police Station, arriving there as aforesaid at about 2 P. M.

Said Latham was the last witness called in this case and called by the Government in rebuttal. I was taken by surprise at the testimony given by him in alleged rebuttal and the evidence of the cases I have hereinbefore set forth and my connection therewith, is material to me, and I could not with reasonable diligence have discovered it and produced it at the trial, because of the manner in which and the time at which Latham testified and the subject matter to which he testified. Said Latham did not fix the date in September, 1924, when he claims to have seen me at said 1249 Polk Street, any more definitely than to say that it was in the latter part of September, and for this additional reason, said evidence of my movements as hereinbefore set forth during the whole month of [414] September, 1924, was and is material to me.

JOSEPH GORHAM.

Subscribed and sworn to before me this 19th day of January, 1925.

[Seal] R. H. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling the attorney for the defendant Gorham then and there duly excepted.

Thereupon and at the same time the attorney for

the defendant Gorham presented to the Court a motion in arrest of judgment, which motion was and is in the words and figures following, to wit:

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes defendant Joseph Gorham in the above-entitled action, and against whom a verdict of guilty was rendered on the 14th day of January, 1925, on the indictment herein, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States, nor does it charge [415] said defendant with the doing of anything, the doing of which is prohibited by the laws of the United States.

2. That the said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

3. That said indictment does not set forth facts sufficient in law to support the evidence.

4. That the defendants in said cause entered into a conspiracy to do the acts charged to have been done by them, is a conclusion of law and does not state any cause or offense against the laws of the United States.

5. That allegation "7" in said indictment:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out, and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division for the Northern District of California, within the jurisdiction of this Court, receive as such Police Officer from said defendant George Birdsall, *alias* George Howard, *as such police officer from said defendant, George Birdsall, alias George Howard,* the sum of $90.00, lawful money of the United States.
>
> Against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such cases provided."

(a) That there is no statute of the United States of America preventing a police officer or police sergeant of the city and county of San Francisco from receiving money from any person.

(b) That it is no crime, nor is it forbidden by the laws of the State of California, for a police officer, or a police sergeant of the city and county of San Francisco, to [416] receive money from any person.

(c) That said paragraph setting forth said alleged overt act does not state that said sum of $90.00 was received by said Joseph Gorham as such police officer or sergeant, for any unlawful purpose.

(d) That said paragraph does not state that said Joseph Gorham received said sum of $90.00 for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

WHEREFORE, this defendant prays that this motion be sustained and that judgment of conviction against him be arrested and held for naught and that he have all such further orders as may be just and proper in the premises.

WILLIAM A. KELLY,
Attorney for Defendant Joseph Gorham.

Said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion in arrest of judgment, to which ruling the attorney for the defendant Gorham then and there duly and regularly excepted.

Thereupon, and at said time, the attorney for defendant Patrick Kissane presented to the Court a motion for a new trial on behalf of the defendant Patrick Kissane, which said motion for a new trial was and is in the following words and figures, to wit: [417]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

MOTION FOR A NEW TRIAL (PATRICK KISSANE).

Now comes Patrick Kissane, one of the defendants in the above-entitled cause, and by Jos. L. Taaffe, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence is said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

V.

That the Court improperly instructed the Jury to the defendant's prejudice.

Dated at San Francisco California, this 6th day of January, 1925.

PATRICK KISSANE,
Defendant.
JOS. L. TAAFFE,
Attorney for Defendant. [418]

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling the attorney for the defendant Kissane then and there duly and regularly excepted.

Thereupon, and at the same time, the attorney for the defendant Patrick Kissane presented to the Court a motion in arrest of judgment, which motion was and is in the words and figures following, to wit:

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant, Patrick Kissane, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant, Patrick Kissane, heretofore given and made in said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That the facts stated in the indictment on file herein upon which said conviction was and is based and upon which judgment was pronounced do not constitute a crime or public offense within the jurisdiction of this Court. [419]

II.

That said indictment does not state facts sufficient to charge the defendant Kissane with any crime or offense against the United States or against any statute or law thereof.

III.

That said indictment does not state facts sufficient to charge the defendant Kissane with having conspired with the defendants named in said indictment or each or either of them to commit any crime or offense against the United States or any law or statute thereof.

IV.

That the allegations in said indictment that the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is merely a conclusion of law and does not state any crime or offense against the United States or any law or statute thereof.

V.

That allegation 7 of said indictment, to wit:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified appointed and acting police officer of the police force of the City and County of San Francisco, California, did on or about the 17th day of November, 1923, at 1249 Polk Street in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, receive as such police officer from said defendant

George Birdsall, *alias* George Howard the sum of Five ($5.00) Dollars lawful money of the United States of America.

"Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and [420] provided,"

is insufficient to charge an overt act in furtherance of said conspiracy etc.; for the following reasons:

a. That there is no statute of the United States of America which forbids or prohibits a person receiving money as a police officer.

b. That it is no crime nor is it forbidden by the laws of the State of California for a person to receive money as a police officer.

c. That said paragraph 7 setting forth said alleged overt act does not state that the said sum of Five Dollars was received by said Patrick Kissane as such police officer for any unlawful purpose.

d. That said paragraph 7 does not state that said Patrick Kissane received said sum of Five Dollars for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

VI.

That this Honorable Court has no jurisdiction to pass judgment upon the defendant, Patrick Kissane, by reason of the fact that the said indictment fails to charge said defendant with any

crime against the United States, but on the contrary the said indictment shows affirmatively that the matters and things which the said Kissane is alleged to have done in connection with the other defendants or any or either of them are not unlawful or criminal, or in violation of any penal statute of the United States and more particularly for the reasons hereinbefore set forth in paragraph one of this motion. [421]

WHEREFORE, by reason of the premises the said defendant Patrick Kissane prays this Honorable Court that judgment herein be arrested and withheld and that conviction of said defendant, Patrick Kissane, be declared null and void.

JOS. L. TAAFFE,
Attorney for Defendant.

Said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion in arrest of judgment, to which ruling the attorney for the defendant Patrick Kissane then and there duly and regularly excepted.

Thereupon, and at said time, the attorneys for Joseph E. Marron and George Birdsall, defendants, presented to the Court a motion for a new trial on behalf of the defendants Joseph E. Marron and George Birdsall; which said motion was and is as follows, to wit:

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION FOR A NEW TRIAL FOR DEFENDANTS JOSEPH E. MARRON, *alias* EDDIE MARRON, and GEORGE BIRDSALL, *alias* GEORGE HOWARD.

Now come the defendants Joseph E. Marron and George Birdsall and move the Court that the verdict herein rendered be vacated and a new trial heard for the following reasons: [422]

1. That the verdict is contrary to the evidence.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing defendants Joseph E. Marron and George Birdsall special instructions Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 30, 31 and 36.

5. That the Court erred insomuch of its general charge as it left to the jury to determine whether or not the defendants here or either, or any

of them, were the parties to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendants.

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendants.

10. Errors of law occurring at the trial and excepted to by the defendants.

11. Further, on the ground of newly discovered evidence.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendants Joseph E. Marron and George Birdsall. [423]

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling attorneys for the defendants Joseph E. Marron and George Birdsall then and there duly and regularly excepted.

Thereupon and at the same time the attorneys for the defendants Joseph E. Marron and George Birdsall presented to the Court a motion in arrest of judgment, which motion was and is as follows, to wit:

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now come the defendants Joseph E. Marron and George Birdsall in the above-entitled action and against whom a verdict of guilty was rendered on the 14th day of January, 1925, on the indictment filed herein, and move the Court to arrest the judgment against said defendants on said indictment and hold for naught the verdict of guilty rendered against them for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendants with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been [424] committed against the United States.

4. That evidence against these defendants has

been received on matters pertaining to former jeopardy, which said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient in law to support a conviction.

7. That these defendants have been convicted without the process of law, and in violation of Articles IV, V and VI of Amendments to the Constitution of the United States.

WHEREFORE, these defendants pray that this motion be sustained and the judgment of conviction against them be arrested and held for naught, and that they have all such other orders as may be just and proper in the premises.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendants Joseph E. Marron and George Birdsall.

That said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration the Court denied the motion in arrest of judgment, to which ruling the attorneys for the defendants Joseph E. Marron and George Birdsall then and there duly and regularly excepted.

The Court having denied the motions for a new trial and the motions in arrest of judgment as to said defendants, thereupon the Court rendered its judgment:

That whereas, the said Joseph E. Marron, George

Birdsall, Charles Mahoney, Patrick Kissane and Joseph [425] Gorham having been duly convicted in this Court for the crime of conspiracy;

IT IS THEREFORE ORDERED AND ADJUDGED that said defendant Marron be imprisoned for two years in the penitentiary, and a fine of ten thousand dollars; the defendant Birdsall to thirteen months in the penitentiary, and a fine of one thousand dollars; the defendant Mahoney, a fine of five hundred dollars; the defendant Kissane, two years in the penitentiary and a fine of one thousand dollars; the defendant Gorham two years in the penitentiary and a fine of two thousand five hundred dollars.

Judgment entered this —— day of January, 1925.

WALTER B. MALING,
Clerk.

By ————————,
Deputy Clerk.

[Endorsed]: No. 15708. Hawkins et al. Jan. ——, 1925. Entered in Vol. ——, Judgment and Decrees, at page ——.

The above bill of exceptions contains all the evidence, oral and documentary, and all of the proceedings relating to the trial, judgment and conviction and sentence, motion for a new trial and motion in arrest of judgment of the defendants, and each of them.

WHEREFORE, in order that all the proceedings had upon the trial of the above-entitled cause may be preserved, the defendants herein propose the

foregoing as a full and correct bill of exceptions of all the proceedings had and of all the evidence adduced at the trial by both the plaintiff and [426] the defendants, and pray that the same may be settled and allowed as a bill of exceptions of such proceedings, to be used on appeal from the judgment herein.

Dated: January 2d, 1925.

CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.

JOS. L. TAAFFE,
Attorney for Patrick Kissane,
WILLIAM A. KELLY,
Attorney for Joseph Gorham. [427]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendants that all exhibits in-

troduced in evidence and for identification upon the trial of the above-entitled cause, and now in the custody of the Clerk of the court, shall be deemed to be included as a part of the foregoing bill of exceptions, with the same effect in all respects as if incorporated in said bill of exceptions. In the event the said exhibits are not so numbered as to identify the same, they shall be marked by the Court upon its certification of this bill of exceptions so as to identify the same.

It is further hereby stipulated and agreed that this bill of exceptions may be used as the bill of exceptions for the writ of error sued out separately by the defendant Joseph E. Marron, and the writ of error sued out separately by the defendant George Birdsall, and the writ of error sued out separately by the defendant Patrick Kissane, and the [428] writ of error sued out separately by the defendant Joseph Gorham.

Dated February 3, 1925.

STERLING CARR,
United States Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.
Attorneys for the United States.
CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.
JOS. L. TAAFFE,
Attorney for Patrick Kissane,
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the respective defendants that the proposed bill of exceptions of said defendants on said writs of error sued out separately by each defendant, and the proposed amendments of the United States to said bill of exceptions, have been correctly engrossed and have been presented in time and, as engrossed, may be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects; and that the same shall be made a part of the record in said case and shall be and is the bill of [429] exceptions upon the writs of error sued out seprately by each of the defendants herein.

Dated February 3, 1925.

STERLING CARR,
United States Attorney
KENNETH C. GILLIS,
Asst. U. S. Attorney,
Attorneys for the United States.
CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.
JOS. L. TAAFFE,
Attorney for Patrick Kissane.
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, as per stipulation of the attorneys for the respective parties.

Dated February 5, 1925.

JOHN S. PARTRIDGE,
U. S. District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [430]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS (PATRICK KISSANE).

Now comes Patrick Kissane, one of the defendants in the above-entitled court, by Jos. L. Taaffe,

Esq., his attorney, and says that on the 14th day of January, 1923, this Court rendered judgment and sentence against said defendant whereby he was adjudged and sentenced to imprisonment and to be fined, to wit: To be imprisoned for a term of two years in the Federal Penitentiary at Fort Leavenworth, State of Kansas, and to pay a fine in the sum of One Thousand Dollars ($1000) in United States gold coin; that in the judgment and proceedings had prior thereto in this cause certain errors were permitted to the prejudice of the said defendant Kissane, all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the said defendant Patrick Kissane prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of, and that a transcript of the record in this cause duly authenticated may be sent to said Circuit Court of Appeals, and that the defendant Patrick Kissane be awarded a supersedeas upon said judgment and all and necessary and [431] proper process, including bail.

PATRICK KISSANE,
Defendant and Petitioner.
JOS. L. TAAFFE,
Attorney for Petitioner and Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted, this 20 day of January, 1925.

STERLING CARR,
United States Attorney.
By T. J. SHERIDAN,
Asst. Attorney for the United States.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [432]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

ASSIGNMENT OF ERRORS (PATRICK KISSANE).

Patrick Kissane, one of the defendants in the above-entitled action, and plaintiff in error herein, having petitioned the Court for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered herein in said cause

against said Patrick Kissane, now makes and files with his said petition the following assignment of errors herein upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors, and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law, and he says that in the record and proceedings of the above-entitled cause, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this to wit:

I.

The Court erred in pronouncing sentence and rendering judgment upon conviction under an indictment which was fatally [433] defective and which was called to the Court's attention in defendant's motion in arrest of judgment, which set forth the following deficiencies, to wit:

It appears upon the face of the record that no judgment can be legally entered against the defendant Kissane, for:

(1) The facts stated in the indictment on file herein and upon which said conviction was and is based and upon which judgment was pronounced do not constitute a crime of public offense within the jurisdiction of this Court.

(2) That said indictment does not state facts sufficient to charge the defendant Kissane with any crime or offense against the United States or against any statute thereof.

(3) That said indictment does not state facts sufficient to charge the defendant Kissane with having conspired with the defendants named in the said indictment, or each or either of them, to commit any crime or offense against the United States.

(4) That the allegation in said indictment that the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is merely a conclusion of law and does not state any crime or offense against the United States.

(5) That allegation 7 of said indictment, to wit:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified, appointed and acting police officer of the police force of the City and County of San Francisco, California, did on or about the 17th day of November, 1923, at 1249 Polk Street, in the City and County of [434] San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, receved as such police officer from said defendant, George Birdsall, alias George Howard, the sum of Five ($5.00) Dollars, lawful money of the United States of America."

"Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided."

is insufficient to charge an overt act in furtherance of said conspiracy, etc., for the following reasons:

a. That there is no statute of the United States of America which forbids or prohibits a person receiving money as a police officer.

b. That it is no crime nor is it forbidden by the laws of the State of California for a person to receive money as a police officer.

c. That said paragraph setting forth said alleged overt act does not state that the said sum of five dollars was received by said Patrick Kissane as such police officer for any unlawful purpose.

d. That said paragraph does not state that said Patrick Kissane received said sum of five dollars for the purpose of permitting the other defendants or any or either of them charged in said indictment to violate any law or laws of the United States.

II.

That this Honorable Court has no jurisdiction to pass judgment upon the defendant, Patrick Kissane, by reason of the fact that the said indictment fails to charge said defendant with any crime against the United States, but, on the contrary, the said indictment shows affirmatively that the matters and things which the said Kissane is alleged to have done in [435] connection with the other defendants or any or either of them are not unlawful or criminal, or in violation of any penal

statute of the United States and more particularly for the reasons hereinbefore set forth in paragraph one of this motion.

To the Court's ruling denying defendant and plaintiff in error Kissane's motion in arrest of judgment, said defendant duly excepted. This question is reviewable as well under rule II of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

SECOND.

The Court erred in admitting in evidence the following testimony over the objection of counsel for the defendant, Patrick Kissane, made upon the ground that in so far as that defendant was concerned the testimony was immaterial, irrelevant and incompetent; that no proper foundation had been laid for it; that no attempt had been made at all by the Government witnesses to connect the defendant Kissane with the book in any manner whatsoever. The Court overruled said objection, to which ruling the defendant, Patrick Kissane, duly excepted. The Court also erred upon this same subject when at the conclusion of the testimony to be hereinafter set out counsel for the defendant, Patrick Kissane, moved to strike out all of the evidence, which had been introduced in reference to the book mentioned herein, in so far as it might affect the rights of defendant, Patrick Kissane, upon the ground that the testimony had been shown to be immaterial, irrelevant and incompetent; and in so far as the defendant Kissane was concerned it was purely hearsay and that no foun-

dation had been laid for it. The Court denied said motion to which order denying same, the defendant Kissane then and there duly excepted. That the testimony, relating to this subject, defendant's objections, the Court's ruling and the defendant Kissane's exceptions were as follows: [436]

TESTIMONY OF W. F. WHITTIER, CALLED FOR THE GOVERNMENT.

Mr. GILLIS.—I will show you a book, Mr. Whittier, and ask you to look at it. Do not make any statements in reference to it until after you have looked at it.

WITNESS.—That is the book.

Mr. GILLIS.—When did you first see this book?

A. When we went in Agent Howard and I went into where we found the champagne in the closet in the front room.

Q. It was on October 2, 1924? A. Yes.

Q. At 1249 Polk Street? A. Yes.

Q. Where did you find this book?

A. In those premises. In that closet there is a wash-stand and this book was on the wash-stand under the cigar-box with a lot of currency in it.

Q. Was the closet locked?

A. Yes, the closet was locked.

Q. Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. TAAFFE.—In so far as the defendant Kissane is concerned, we will interpose the objection at this time that it is immaterial, irrelevant and incompetent and no proper foundation has been laid and furthermore that there has been no attempt at all made by the Government witness to connect Kissane with this book in any manner [437] whatsoever.

The COURT.—Overruled.

Mr. TAAFFE.—Exception.

Mr. GILLIS.—(Reading to the jury.) I will call your attention, Gentlemen, to a few of the things in this book; I will call your attention to page 34, an item in the center of the page after 17/23, which is marked "gift Kissane" and above the word Kissane is written the word police. Then on page 51 we have the word in the center of the page police $100.00 and the word Kissane $5.00. On page 60 we have Kissane on the 10th, $5.00. On page 68 for March we again have on March 23, Kissane $5.00; 9th, Kissane $5.00, and on the 16th, $5.00, on the 23d, $5.00, and on the 30th, Kissane $5.00. On page 74 for the month of April we have on the 6th, Kissane $5.00; on the 13th, marked gift $5.00; on the 20th, gift $5.00; on the 27th, Kissane $5.00; on page 80 for the month of May we have on the 4th, $5.00; on the 11th, $5.00; on the 25th, $5.00 and on the 17th, Kissane $5.00. Then on page 36 for the month of June we have, on June 1, Kissane $5.00; on the 8th, Kissane $5.00; on the

15th, Kissane $5.00 and on the 22d, police $15.00. On page 92 for July we have, on the 6th, Kissane $5.00; on the 13th, $5.00; on the 20th, Kissane $5.00; on the 27th, Kissane $5.00. On page 98 for the month of August we have on the 3d, Kissane $5.00; on the 10th, Kissane $5.00; on the 16th, Kissane $5.00 and on the 24th, Kissane $15.00. On page 104 for the month of September, we have on the 21st, Kissane $15.00; on the 28th, Kissane $5.00. Now, I call your attention to page 69 and an item marked on page 69 towards the bottom of the page, gift $60.00, and underneath as a matter of fact the last item, this is for March, 1924, new police. On page 74 we have gift $90.00 on the 16th, and on the 27th we have gift $60.00. On page 80 we have police on the 22d, $90.00, and on the 26th, police $60.00. On page 86 we have the 14th of [438] June, police $150.00. On page 92 we have gift $150.00 and on page 98 we have gift police $150.00, that is August 11. On page 104, September 15, we have gift $150.00.

Mr. TAAFFE.—I make a motion at this time to strike out all of the evidence that has been introduced with reference to the book in so far as it might affect the rights of defendant Kissane upon the grounds that it is immaterial, irrelevant and incompetent and in so far as he is concerned it is purely hearsay and the proper foundation has not been laid for it.

The COURT.—Motion denied.

Mr. TAAFFE.—Note an exception.

THIRD.

The Court erred in admitting in evidence over the objection of the defendant, Patrick Kissane, a certain book containing a number of items with the name "Kissane" in it, which was not shown at the time or any time subsequent to be the defendant, Patrick Kissane. The objection was made upon the ground that it was incompetent, irrelevant and immaterial; that no foundation has been laid for it and no attempt had been made at all by the Government witnesses to connect the defendant, Patrick Kissane, with it. The Court overruled the objection of the defendant, Patrick Kissane, and admitted the book in evidence. To the Court's order and ruling defendant, Patrick Kissane, duly excepted. The testimony concerning same is set out in full under the second assignment of error, hereinabove set forth and is made a part hereof.

FOURTH.

The Court erred in denying the motion of the defendant, Patrick Kissane, to strike out the evidence which had been introduced by reading from a book, named in the proceedings as Government's Exhibit Number 3, entries with the name Kissane. The motion was made upon the ground that in so far as it affected [439] the rights of the defendant, Patrick Kissane, it was immaterial, irrelevant and incompetent. As far as he was concerned it was purely hearsay and the proper foundation had not been laid for it. To the Court's order denying the defendant Kissane's motion to strike out said

testimony, defendant, Patrick Kissane, duly excepted. The testimony concerning this point is set out in full under the second assignment of error herein and is made a part hereof.

FIFTH.

The Court erred in submitting to the jury for its deliberation and verdict the charge contained in the indictment against the defendant, Patrick Kissane, for the following reasons: First, there was no conspiracy proven. Second, that the evidence was insufficient to connect the defendant, Patrick Kissane, with any conspiracy to violate any of the provisions of the National Prohibition Act or the regulations of the Commissioner of Internal Revenue or any modifications thereof. Third, that the indictment upon which the defendant, Patrick Kissane, was accused and tried did not state any public offense against the laws of the United States. Fourth, that the evidence adduced before the Court was insufficient to prove that the defendant, Patrick Kissane, ever maintained a common nuisance in keeping for sale and selling any intoxicating liquors for beverage purposes or otherwise at any of the places mentioned and set forth in the said indictment. And the evidence is insufficient to show that he aided or abetted or conspired or confederated or agreed with the other defendants or any or either of them or any person or persons in maintaining common nuisances in keeping for sale or selling intoxicating liquors for beverage purposes at the places set forth in the said indictment. Fifth, the evidence was insufficient to convict the

defendant, Patrick Kissane, of selling intoxicating liquor to any person whatsoever at any time, place or at all or that he aided or abetted or conspired or confederated or agreed with the other defendants mentioned in the indictment or with any or either of them or with any person or persons whatsoever in the sale of intoxicating liquors at the places [440] and times mentioned in the indictment or at all. Sixth, the evidence was insufficient to convict the defendant, Patrick Kissane, of the possession, manufacture, transportation or any other offense under the National Prohibition Act, or the Regulations of the Commissioner of Internal Revenue or any modifications thereof, or that he aided or abetted or conspired or confederated or agreed with the other defendants mentioned in the indictment or with any or either of them or with any person or persons whatsoever in the possession, transportation, manufacture of intoxicating liquors at the places or times mentioned in the said indictment or at all; or that he aided or abetted or conspired or confederated or agreed with any of the persons mentioned in the indictment or with any person whatsoever for any other violation of the National Prohibition Act or the rules of the Commissioner of Internal Revenue or any modifications thereof. Seventh, that the evidence was insufficient to prove that the defendant, Patrick Kissane, is or was the same person referred to as Kissane in Government's Exhibit Number 3. Eight, that the evidence is insufficient to prove that the defendant, Patrick Kissane, is the same person

referred to as Kissane in any of the testimony adduced by the Government. Ninth, that the evidence was insufficient to prove that the defendant, Patrick Kissane, received, accepted or took five dollars or any other sum or sums of money from any person or persons mentined in the said indictment or from any other person or persons whatsoever at the places specified in said indictment or at any place or places whatsoever either on the date or dates mentioned in said indictment or at any other time either as a police officer or otherwise or at all.

The defendant, Patrick Kissane, at the conclusion of the Government's case and at the conclusion of the taking of testimony, moved the Court for a directed verdict of Not Guilty on account of the insufficiency of the evidence, which was [441] denied by the Court and to which the defendant, Patrick Kissane, duly excepted. The exception taken was comprehensive enough to protect this point, but if it were not, it is such a plain error that it comes within the purview of Rule 11 of the rules of the Circuit Court of Appeals for the Ninth Judicial Circuit.

SIXTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, for a directed verdict of Not Guilty made at the conclusion of the Government's case, upon the ground that the Government had not offered sufficient evidence to convict him of the charge set forth in the indictment.

To the Court's ruling denying said motion the defendant and plaintiff in error, Patrick Kissane, duly excepted.

SEVENTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, for a directed verdict of Not Guilty made at the conclusion of the taking of all of the testimony, upon the ground that the evidence was insufficient to convict him of the charge set forth in the indictment.

To the Court's ruling, denying said motion, the defendant and plaintiff in error, Patrick Kissane, duly excepted.

EIGHTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, made at the conclusion of the taking of all the testimony, to exclude all of the testimony with regard to the defendant, Patrick Kissane, because he had not been connected in any manner whatsoever with the alleged offenses set forth in the indictment.

The Court's order denying said motion, defendant and plaintiff in error, Patrick Kissane, duly excepted. [442]

NINTH.

The Court erred in refusing to give the following instruction, which was presented to the Court by the defendant and plaintiff in error, Patrick Kissane, and requested by him in open court:

"You are further instructed that in considering the evidence introduced in order to determine whether or not a conspiracy was in existence between the defendants on trial herein, to violate the terms, conditions and provisions of the Volstead Act and whether or not the defendants Patrick Kissane and Joseph Gorham conspired with each other and with the other defendants on trial here to affect and consummate the objects of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked 'Government's Exhibit in evidence number three' and give no consideration to the entries therein contained unless from the evidence introduced exclusive of the evidence contained in Exhibit Number Three you are convinced to a moral certainty and beyond a reasonable doubt that a conspiracy existed between all of the defendants to do the acts charged in said indictment."

To the Court's refusal to give such instruction defendant and plaintiff in error, Patrick Kissane, duly excepted.

TENTH.

The Court erred in refusing to give the following instructions requested by said defendant and plaintiff in error, Patrick Kissane.

"The defendant Patrick Kissane is a peace officer, and as to public offenses of the degree of misdemeanors he has no authority to make arrests, unless armed with a warrant save and

except in those cases where the offense is committed in his presence."

To the Court's refusal to give such instruction, said defendant and plaintiff in error, Patrick Kissane, duly excepted. [443]

ELEVENTH.

The Court erred in refusing to give the following instruction requested by the defendant and plaintiff in error, Patrick Kissane.

"While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting the proprietor or visitors thereof does not constitute a neglect of his official duty."

To the Court's refusal to give such instruction said defendant and plaintiff in error, Patrick Kissane, duly excepted.

TWELVE.

The Court erred in giving the following instruction or comment over the objection of the defendant and plaintiff in error, Patrick Kissane, to which instruction the said defendant and plaintiff in error, Patrick Kissane, duly excepted, in open court after calling the Court's attention to same.

"Now that statute passed by the State of California to say nothing of the Statute of the United States places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and,

where he finds that persons are transgressing it to see that they are arrested and prosecuted in accordance wih that Statute and the Statute of our Congress. In considering therefore the case of these two police officers, you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest, if they found any person transgressing it. I do not mean that you are to keep [444] this distinction in mind that any man can be found guilty of conspiracy merely because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigating by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or mere shutting of a man's eyes to a violation of the law would not constitute him a conspirator; . . . . Mere negligence or even shutting a man's eyes to a violation of the law would not constitute him a conspirator; but, if, on the other hand, he knew that the law was being violated and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with

them, whether he received any compensation or not. You are to determine, therefore, Gentlemen, from all the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy." . . . . "If you find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise for those two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of that place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, Gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things— [445] first, that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in the regular course of business as

showing as a part of the expenses the payment of money to these officers; and third, if you find that there was any tacit, or other understanding that the place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of Gorham or Kissane or either of them."

THIRTEEN.

The Court erred in denying the motion for a new trial made on behalf of the defendant and plaintiff in error, Patrick Kissane. The grounds of said motion were as follows:

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause was not supported by the evidence in the case.

(3) That the evidence in said cause is insufficient to justify said verdict.

(4) That the Court erred upon the trial of said cause in deciding questions of law during the course of the trial arising during the course of the trial which errors were duly excepted to.

(5) That the Court improperly instructed the jury to defendant's prejudice.

To which ruling defendant and plaintiff in error, Patrick Kissane, duly excepted.

WHEREFORE, plaintiff in error, Patrick Kissane, prays that for the reasons contained herein,

the judgment and sentence rendered herein be reversed.

PATRICK KISSANE,
Defendant and Plaintiff in Error.

JOS. L. TAAFFE,
Attorney for Defendant and Plaintiff in Error.

Due service of the within assignment of errors is hereby admitted, this 20th day of January, 1925.

STERLING CARR,
Attorney for Pltf. [446]

[Endorsed]: Filed January 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [447]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CR.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS (PATRICK KISSANE).

The writ of error and the supersedeas herein prayed for by Patrick Kissane, one of the defendants herein and plaintiff in error pending the

decision on said writ of error, is hereby allowed and the defendant, Patrick Kissane, is admitted to bail in the sum of Five Thousand ($5,000.00) Dollars.

The bond for costs of the writ of error on behalf of said defendant, Patrick Kissane, is hereby fixed at Two Hundred and Fifty ($250.00) Dollars.

Dated at San Francisco, California, this 20th day of January, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Due service of the within order allowing writ of error and supersedeas acknowledged and hereby admitted this 20 day of January, 1925.

STERLING CARR,
United States Attorney.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [448]

In the Southern Division of the United States District Court for Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

PETITION FOR WRIT OF ERROR (JOSEPH GORHAM).

Now comes Joseph Gorham, one of the defendants in the above-entitled action, through his attorney, W. A. Kelly, Esq., and feeling aggrieved by the judgment of this court made and entered on the 14th day of January, 1925, wherein and whereby this defendant was sentenced to pay a certain money fine and to be imprisoned, as set forth in the judgment made and entered by the Court in said cause, to which judgment reference is hereby made for greater particularity, and your petitioner shows that he is advised by counsel and therefore that he avers that there was and is manifest error in the records and proceedings had in said cause and in the making, rendition and entry of said judgment and sentence to the great*y* injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of said record, by examination of the bill of exceptions and assignment of errors filed herein and presented herewith.

And hereby petitions this Honorable Court for an allowance of a writ of error herein to the United States Circuit Court of Appeals in and for the Ninth Circuit, and that a full and complete transcript of the record and [449] proceedings in said cause be transmitted by the clerk of this Court to the Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that during the pendency of this writ of error,

all proceedings had in this court be suspended, stayed and superseded, and that during the pendency of said writ of error, the defendant, Joseph Gorham, be admitted to bail in such sum as to this Honorable Court seems meet and proper.

Dated: this 20th day of January, 1925.

WILLIAM A. KELLY,
Attorney for Joseph Gorham.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [450]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

ASSIGNMENT OF ERRORS OF DEFENDANT JOSEPH GORHAM.

Now comes the defendant, Joseph Gorham, in the above-entitled action, and in connection with his petition for a writ of error herein makes the following assignment of errors, which he avers occurred upon the trial of said cause, to wit:

I.

That the Court erred in admitting in evidence that certain book marked on the trial of said cause as United States Exhibit No. 3 in evidence, upon the following grounds:

That it was immaterial, irrelevant and incompetent, hearsay as against defendant Gorham, nor proper foundation laid for its introduction against him, and that at the times of its introduction there was no evidence before the Court that Gorham conspired or confederated as charged in the indictment as hereafter more fully appears.

Mr. KELLY.—On behalf of the defendant Gorham, the book is objected to on the ground it is immaterial, irrelevant and incompetent, hearsay as against him, no foundation has been laid for the introduction of this [451] book in evidence against him, upon the ground that there is no evidence before this Court that he ever conspired or confederated in accordance with the allegations of the indictment.

The COURT.—Overruled.

Mr. KELLY.—Exception.

(Rep. Tr. Vol. —— p. 22.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

II.

That the Court erred by its refusing to grant the motion of the defendant Gorham that the book, United States Exhibit No. 3, in evidence, and all the evidence and items mentioned therein be

stricken from the record as to the defendant Gorham, upon the following grounds:

That it was immaterial, incompetent, irrelevant and hearsay as to the defendant Gorham; that no proper foundation had been laid for its introduction, and that no evidence had been adduced in any way connecting him with the conspiracy charged, as more fully appears below.

Mr. KELLY.—Your Honor will note that I objected primarily to the introduction of this book in evidence on the ground that it was immaterial, irrelevant and incompetent, as against the defendant Gorham, that it was hearsay, and not binding upon him, and there was no proper foundation laid, in that there had been no evidence showing his connection with the other defendants in any conspiracy, confederation or unlawful agreement as set forth in the indictment. I now ask that all of the evidence of this book, and each and every item read by the Government to the jury in the record from the book, be stricken from the record as against the [452] defendant Gorham on like grounds. Your Honor will note that during the reading of this record the word "Gorham" was not mentioned.

The COURT.—Of course, Mr. Kelly, it cannot hurt him. Of course, if that was all the evidence that was to be produced, the motion for a directed verdict would follow, but you will realize, of course, the rule that in the orderly presentation of the case, the whole thing cannot be presented at once, and that the *corpus delicti*, while it has to be estab-

lished, need not be established prior to the introduction in evidence.

Mr. KELLY.—I grant the point that the order of proof is in the sound discretion of the Court.

The COURT.—Motion denied.

Mr. KELLY.—Exception.

Mr. GILLIS.—One item that has been called to my attention, I still wish to call to the attention of the jury in this gray book, on page 92, the name "Gorham" appears, $60, with some lines drawn through it; on the top of page 93 "Gorham, $60," and on the same page, "Joe Gorham, $60."

Mr. O'CONNOR.—If your Honor please, I renew the motion I made as to the other items as to these items, with the understanding that it is overruled and an exception noted.

The COURT.—Yes.

Mr. SMITH.—May my motion be renewed in a like manner?

The COURT.—Yes.

Mr. KELLY.—In behalf of the defendant Gorham, I renew the motion, your Honor, and take an exception.

The COURT.—Yes.

(Rep. Tr. Vol. 1, pp. 27, 28.) [453]

III.

That the Court erred in overruling the motion of said defendant Gorham for a directed verdict of Not Guilty at the conclusion of the Government's case, said motion being based upon the following grounds:

That as a matter of law the evidence was not suf-

ficient to warrant the submission of the case to the jury, or to warrant the finding of a verdict of guilty, as hereafter more fully appears:

Mr. KELLY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against him a verdict of Not Guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe?

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAFFEE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant [454] Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the

record, the same motion as to the defendant Mahoney, upon similar grounds.

Mr. GREEN.—I do not desire to join in the motion. I will submit my case to the jury.

(Rep. Tr. V. 5, p. 261.)

The COURT.—The motion is denied. Of course as to the other defendants, there is no question that there is sufficient evidence as to them to go to the jury.

Mr. KELLY.—May we note an exception on behalf of the defendant Gorham?

Mr. TAAFFE.—An exception on behalf of Kissane.

Mr. O'CONNOR.—Let the record show an exception in behalf of the defendant Mahoney.

Mr. SMITH.—Let the record show an exception on behalf of the defendants Marron and Birdsall.

The COURT.—Do you want an exception, Mr. Green?

Mr. GREEN.—No.

(Thereupon the jury returned into court.)

The COURT.—I believe, gentlemen, the rule requires a ruling to be made in the presence of the jury on these motions, also. The motions are denied.

Mr. KELLY.—I wish to note an exception in behalf of the defendant Gorham.

The COURT.—An exception may be noted on behalf of all the defendants.

(Rep. Tr. V. 5, p. 267.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

IV.

That the Court erred in overruling the motion [455] of said defendant Gorham for a directed verdict of not guilty at the conclusion of said trial before the submission of said cause to the jury, which said motion was on the following grounds:

That the evidence offered against defendant Gorham is not sufficient as a matter of law to sustain any verdict other than that of not guilty, as hereafter more fully appears:

Mr. KELLY.—Prior to Mr. Taaffe addressing the Court, I move the Court on behalf of the defendant Gorham, for a directed verdict, on the ground that the evidence is insufficient, as a matter of law to sustain a contrary verdict.

The COURT.—I think the situation is stronger against you than it was before. The motion is denied. Now, Mr. Taaffe, I will hear you.

Mr. KELLY.—Note an exception.

(Rep. Tr. pp. 423, 424.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

V.

That the Court erred in admitting in evidence the testimony of William Kenly Latham, a witness called on behalf of the Government in rebuttal over the objections of defendant Gorham, upon the following grounds:

That said evidence was not proper rebuttal.

Mr. GILLIS.—Q. You have already been sworn in this case, Mr. Latham. Mr. Latham, did you

visit 1249 Polk Street, the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what? [456]

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249, so there is nothing to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

Q. Do you remember about when that was approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it.

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the

entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and [457] immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time, who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir.

Q. That would be the side nearer the Judge's Bench? A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mr. Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled. [458]

Mr. SMITH.—Note the exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out?

A. I poured out some myself.

Q. What was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose of getting a drink, and I went out.

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

Q. Near the kitchen was it? A. Yes, sir.

Q. Now, from the conversation that occurred between Gorham and Mahoney, did it appear to you that they knew each other, and were on friendly terms, or otherwise?

Mr. TAAFFE.—That is objected to as called for the conclusion of the witness.

Mr. GILLIS.—Just how it appeared to him. [459]

The COURT.—Better put it, what was the nature of the relations, as you observed it?

A. Well, they spoke to each other; as to what they said, I couldn't recall.

The COURT.—Q. You mean that Sergeant Gorham there came into the kitchen when you were drinking there, and he was talking with Mahoney.

A. I do.

The COURT.—Go ahead.

Mr. GILLIS.—Q. Did Gorham stay in there for a few minutes?

A. To the best of my recollection, I left him there. I went right out and went down the stairs.

Q. After you had your drink? A. Yes, sir.

Q. Your drink—you poured your drink while he was there? A. Yes, sir.

Mr. GILLIS.—That is all.

Cross-examination.

Mr. KELLY.—Q. What date was this in September?

A. The latter part; I couldn't give the exact date.

Q. Couldn't you approximate the date?

A. I couldn't.

Q. Was that the best way you can put it down, the latter part of September?

A. It was; that was the best I could give you—I couldn't give you the exact time, because I didn't pay any attention to the date.

Q. What time of the day was it, or night?

A. It was in the forenoon. *A.* I should judge around 11:00 o'clock; maybe half-past eleven.

(Rep. Tr., pp. 416 to 420.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

VI.

That the Court erred in abusing its judicial dis-

cretion in denying the motion of the defendant Gorham for a new trial, which motion was made upon the grounds as appears hereinafter in Sections 1, 2, 3, 4, 5, 6 and 7:

1. That the verdict was contrary to the evidence. [460]

2. That the verdict was contrary to the weight of the evidence.

3. That the verdict was contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing instruction No. 1 requested by the defendant Gorham.

5. That the Court erred in admitting evidence contrary to the law.

6. That newly discovered and material evidence has come to light since the trial.

7. Errors of law occurring at the trial and excepted to by the defendant Gorham, to which ruling of the Court the defendant Gorham then and there duly and regularly excepted.

And, upon the following further grounds:

That the Court misdirected the jury in matters of law and erred in its decision on questions of law arising during the trial; that new evidence material to the defendant Gorham has been discovered which he could not with due and reasonable diligence produce at the trial.

VII.

That the Court erred in abusing its discretion and in denying the motion of the defendant Gorham made in arrest of judgment, which said motion

was made upon the grounds as appear in Section 1, 2 and 3, and 4, 5.

1. That said indictment does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything, the doing of which is prohibited by the laws of the United States.

2. That the said indictment does not state facts sufficient to constitute an offense against the laws of the United ——. [461]

3. That said indictment does not set forth facts sufficient in law to support the conviction.

4. That the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is a conclusion of law and does not state any cause or offense against the laws of the United States.

5. That allegation 7 of said indictment—"That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did, on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive, as such police

officer, from said defendant, George Birdsall, *alias* George Howard, the sum of Ninety (90.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided."

a. That there is no statute of the United States of America preventing a police officer or police sergeant of the City and County of San Francisco, State of California, from receiving money from any person.

b. That it is no crime nor is it forbidden by the laws of the State of California for a police officer or a [462] police sergeant of the police department of the city and county of San Francisco, State of California to receive money from any person.

c. That said paragraph setting forth said alleged overt act does not state that the said sum of $90 was received by said Joseph Gorham as such police officer or sergeant for any unlawful purpose.

d. That said paragraph does not state that said Joseph Gorham received said sum of $90 for the purpose of permitting the other defendants or any or either of them charged in said indictment to violate any law or laws of the United States.

To which ruling, the defendant Joseph Gorham, then and there duly and regularly excepted.

VIII.

That the Court erred in rendering judgment and imposing sentence upon the defendant Joseph Gor-

ham for the reason that said judgment and sentence and the verdict of the jury therein, upon which said judgment and sentence were based, were not supported by the evidence introduced herein.

IX.

That the Court erred in denying the preliminary motion made by the defendant George Birdsall for the return and the suppression of Government's Exhibit No. 3 in evidence, upon the grounds that search-warrant issued in said cause was not sufficient to warrant the seizure of said Government's Exhibit No. 3 in evidence.

That said Government's Exhibit No. 3 in evidence was seized without warrant of law, or without authority at all, and in violation of the rights of the defendants under the fourth and fifth amendment to the Constitution of the United States, and that the seizure of said book [463] made the officers seizing the same, trespassers *ab initio,* to which ruling of the Court an exception was then and there duly taken.

X.

That the Court erred at the trial of said cause in refusing to grant the motion to suppress and return said Government's Exhibit No. 3 in evidence, upon the grounds that had theretofore been enumerated in the petition of defendant George Birdsall to return and suppress said exhibit, as hereafter more fully appears:

Mr. GILLIS.—Q. I ask you if you recognize that book? A. Yes.

Q. When did you first see that book?

A. When we got—

Mr. SMITH.—Just a moment: Before we have any testimony on this, I would like to ask the witness a few questions if I may.

Mr. GILLIS.—Upon what theory?

Mr. SMITH.—I want to find out something about the right to take the book.

Mr. GILLIS.—I do not think, your Honor, he has any right to cross-examine now on this proposition; wait until we introduce it in evidence.

The COURT.—It may be that counsel has some point with regard to the question of its admissibility, the manner in which it was found, and the manner in which it was taken.

Mr. GILLIS.—I have not offered it in evidence yet.

The COURT.—You go ahead with your examination and you may examine him before it is admitted in evidence.

Mr. SMITH.—I show you a paper and I will ask you—

The COURT.—No, I want Mr. Gillis to finish the identification, and then you may ask any questions you desire. [464]

Mr. GILLIS.—Q. When did you first see this book?

A. When we went in, Agent Howard and I went in to where we found the champagne in the closet, in the front room.

Q. It was on October 2, 1924. A. Yes.

Q. At 1249 Polk St.? A. Yes.

Q. Just where did you find this book?

A. In those premises, in that closet, there is a wash-stand, and this book was on the wash-stand under the cigar-box, with a lot of currency in it.

Q. Was the closet locked? Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms, was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. SMITH.—To which, of course, we will object.

The COURT.—You can ask your questions first.

Mr. SMITH.—Q. Mr. Whittier, I show you a paper, and I will ask you if you have ever seen that before?

The COURT.—What is that, the search-warrant?

Mr. SMITH.—That is the search-warrant.

The COURT.—The search-warrant that was served at the time.

Mr. SMITH.—Yes, it is a copy of the search-warrant, your Honor.

Q. What is that paper?

The COURT.—It identifies itself. Do you want to put it in evidence.

Mr. SMITH.—No, I do not as yet.

Q. It is a copy, is it not, of the search-warrant, that you executed on the 2d of October, on 1249 Polk Street? A. Yes.

Q. You were fully advised as to the contents of the warrant at the time that you served it, were you not? A. We were. [465]

Q. You know, do you not, that the search-warrant only authorized the search of those premises for certain liquors?

Mr. GILLIS.—I object.

The COURT.—Doesn't it speak for itself?

Mr. SMITH.—Yes, it does.

The COURT.—Why spend time on it?

Mr. SMITH.—I want to show this witness was thoroughly familiar with the contents of the warrant.

The COURT.—It does not make any difference whether he was, or not; if it was a valid search-warrant, authorizing the taking of this book, it speaks for itself; if not, it does not make any difference whether he knew it or not.

Mr. SMITH.—At this time we will ask that all testimony elicited by the Government from this witness with reference to this gray book be stricken out on the ground that it is immaterial, irrelevant and incompetent, there is no foundation for it, and the warrant did not authorize the seizure of that record.

The COURT.—Was this included in your motion before?

Mr. SMITH.—Yes, your Honor, that was one of the motions.

The COURT.—Overruled.

Mr. SMITH.—May the objection, for the purpose of the record show that this book was not de-

scribed nor designated in the warrant as one of the things to be searched or seized?

The COURT.—The warrant is in evidence and speaks for itself.

Mr. SMITH.—I want the record to show what my objections are.

The COURT.—Yes.

Mr. SMITH.—Furthermore, in the case of United States [466] vs. Goulin, the Supreme Court of the United States held that man's records, or books, or papers could not be used as evidence against him, because it would be tantamount to telling the man to take the witness-stand against himself; in either event, whether his records are used, or whether he is compelled to take the stand as against himself, he is an unwilling source of information concerning his actions. Now, we submit that it is indirectly in violation of his constitutional guarantee; that is the second ground. The first ground is that it was unlawfully taken under the warrant.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(Rep. Tr., pp. 18 to 21.)

to which an exception was then and there duly and regularly taken.

XI.

That Court erred by its refusal to give the jury Instruction No. 1, as requested by the defendant Gorham, which instruction was as follows:

"I instruct you that the evidence in this case is insufficient as a matter of law to war-

rant the conviction of the defendant, Gorham, and you are therefore instructed to return a verdict of "Not Guilty" as to defendant Gorham."

to which ruling of the Court an exception was then and there duly taken.

XII.

That the Court erred by its refusal to give Instruction No. 2 as set out in the requested instructions of the defendant, Patrick Kissane, which instruction was as follows:

"You are further instructed that in considering the [467] evidence introduced in order to determine whether or not a conspiracy was in existence between the defendants on trial here, to violate the terms, conditions and provisions of the Volstead Act, whether or not the defendants, Patrick Kissane and Joseph Gorham, conspired with each other, and with the other defendants on trial here to effect and accomplish the object of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked, 'Government Exhibit in Evidence Number 3,' and give no consideration to the evidence therein contained, unless from the evidence introduced, exclusive of the evidence contained in said Exhibit number 3, you are convinced to all certainty and beyond all reasonable doubt, that a conspiracy existed between all of the defendants to do the acts charged in said indictment."

That the Court erred by its refusal to give Instruction No. 3, as requested by the request for instructions of defendant, Patrick Kissane, which was as follows:

> "The defendant Patrick Kissane is a Police Officer and as to public offense to the grade of misdemeanors, he has no authority to make arrests unless armed with a search-warrant, save and except in those cases where the offense is committed in his presence. (Ferguson vs. Superior Court, 26 Cal. App. 554.)"

That the Court erred by its refusal to give Instruction No. 4, as requested by the defendant, Patrick Kissane, in his request for instructions, which instruction was as follows:

> "While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting [468] the Proprietor or visitors thereof, does not constitute a neglect of his official duties. (Ferguson vs. Superior Court, 26 Cal. App. 554.)"

to which failure of the Court to give such requested instruction, an exception was then and there duly and regularly taken.

WHEREFORE, for the many manifest errors committed by the said Court, the defendant, Joseph Gorham, through his attorney, prays that said sentence and judgment of conviction be re-

versed, and for such other and further relief as to the Court may seem meet and proper.

WILLIAM A. KELLY,
Attorney for Joseph Gorham.

Due service and receipt of a copy of the within assignment of error is hereby admitted this 20th day of January, 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [469]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR (JOSEPH GORHAM).

After filing and reading the petition for writ of error filed in the above-entitled action by Joseph Gorham, one of the defendants herein through

his attorney William A. Kelly, Esq., wherein said defendant Gorham prays this Court for an order allowing writ of error to the Circuit Court of Appeals of the Ninth Circuit, and wherein prays the judgment in said cause rendered as appears in said judgment entered herein be superseded, stayed and suspended pending determination of said writ of error and that said defendant, Joseph Gorham, be admitted to bail, and that an order issue for a full and complete transcript of the record of the proceedings had herein, directing the Clerk of this court to forward same to the Clerk of the United States Circuit Court of Appeals of the Ninth Circuit,—

NOW, THEREFORE, it is hereby, ORDERED that the writ of error prayed for in said petition of said Joseph Gorham, be and the same is hereby allowed. It is further,

ORDERED, that the sentence and judgment heretofore interposed on said defendant Joseph Gorham, be stayed, [470] superseded, and suspended, pending decision upon said writ of error, and that defendant Joseph Gorham, be admitted to bail in the sum of $5000.00, and it is further,

ORDERED, that a full and complete transcript of the record and proceedings in said cause be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and it is further,

ORDERED, that bond for costs upon said writ of error be and the same is hereby fixed in the sum of $250.00.

Dated: January 20th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed January 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [471]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

PETITION FOR WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come defendants Joseph E. Marron and George Birdsall in the above-entitled case and feeling themselves aggrieved by the judgment of the above-entitled court, made and entered herein on the 14th day of January, 1925, whereby it was ordered and adjudged that the defendant Joseph E. Marron be imprisoned in the penitentiary for the period of two years and be fined in the sum of Ten Thousand Dollars ($10,000.00), and the defendant George Birdsall be imprisoned in the penitentiary for a period of Thirteen Months and be fined in the sum of One Thousand Dollars ($1,000.00);

and your petitioners show that they were advised by counsel and that they aver that there was and is manifest error in the records and proceedings had in said cause and in the making, rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of said record and by examinations of the bill of exceptions and assignment of errors filed herein and presented herewith and to that end thereafter that the said judgment, sentence, proceedings, may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and now pray that a writ of error may be issued directed therefrom [472] to said Southern Division of the District Court of the United States, for the Northern District of California, returnable according to law and the practice of court, and that there will be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause; that the same may be removed to the United States Circuit Court of Appeals, for the Ninth Circuit, to the end that the errors, if any have appeared, may be corrected, and full and speedy justice may be done to your petitioners, and during the pendency of this writ of error, all proceedings in this court be suspended, stayed and superseded until the final determination of said writ of error. That during the pendency of said writ of error and the final determination thereof, the defendant Joseph E. Marron be admitted to

bail in the sum of ——— dollars and the defendant George Birdsall be admitted to bail in the sum of ——— dollars.

Dated: January 20, 1925.

HUGH L. SMITH,
Attorney for Defendant Joseph E. Marron.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendant George Birdsall.

Receipt of a copy of the within petition is hereby admitted this 20th day of January, 1925.

STERLING CARR,
By THOS. J. RIORDAN,
Asst.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [473]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

Defendants.

ASSIGNMENT OF ERRORS (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come defendants, Joseph E. Marron and George Birdsall, in the above-entitled cause, and in connection with their petition for a writ of error herein make the following assignment of errors which they aver occurred upon the trial of said cause, to wit:

I.

The Court erred in refusing to grant an order directing the jury to return a vedict of not guilty in respect to each of them, to which ruling of the Court said defendants then duly and regularly excepted.

II.

The Court erred in rendering judgment and in imposing sentence upon defendant Joseph E. Marron for the reason that said judgment and sentence, and the verdict of the jury herein upon which said judgment and verdict were based, were not supported by evidence introduced herein; to which ruling of the Court said defendants then duly and regularly excepted.

III.

The Court erred in rendering judgment and in imposing sentence [474] upon defendant George Birdsall for the reason that said judgment and sentence, and the verdict of the jury herein upon which said judgment and sentence were based were not supported by the evidence herein; to which ruling of the Court said defendants then duly and regularly excepted.

IV.

That there was no evidence adduced and none appears in the record showing that the defendants Joseph E. Marron and George Birdsall at any time or place, and particularly at, or in, the city and county of San Francisco, Southern Division of the Northern District of California, and within the jurisdiction of the above-entitled court on or about the 1st day of May, 1923, and thereafter up to and including October 3d, 1924, or otherwise, or at all, combined, confederated and conspired, or combined, or confederated or conspired, or agreed with each other, or with any of the defendants named in said indictment, or all of said de-

fendants named in said indictment, or with any person or persons, or otherwise, or at all, wilfully, unlawfully, feloniously and knowingly made any or all the acts, or each, or any of them, as set forth in the indictment on file herein, to which said indictment reference is hereby made, and the allegations, and each of them, are hereby referred to as if they were expressly incorporated herein.

V.

The Court erred in not granting the following motions made on behalf of the defendant Joseph E. Marron, and prior to the time of the trial of said cause, which said motions were made on the —— day of ——, 1924, and which said motions are as follows:

(a) A plea in bar and a petition to suppress evidence with respect to overt act No. 9 as set out in said indictment and filed herein, to which reference is hereby made on the ground that the [475] matters and things set forth in paragraph nine and overt act in said indictment are identical with the matters and things set forth in the information filed in the above-entitled court on April 26th, 1923, information No. 13,362, to which said information defendant Marron, heretofore had pleaded guilty and satisfied fully judgment as rendered therein by reason thereof that defendant Marron had been once in jeopardy as to the matters and things set forth in said paragraph nine of overt acts in said indictment, to which ruling of the Court said defendant Marron duly and regularly excepted.

(b) A petition to suppress evidence with respect to overt act No. 10 as set out in said indictment and filed herein, to which reference is hereby made upon the grounds that evidence had been secured by Federal Prohibition Agents as a result of an unlawful search and seizure occurring on the 26th day of August, 1924, at 3047 California Street, and that any evidence obtained by said unlawful search and seizure could not properly be admitted in the trial of said cause and contravention of defendant Marron's constitutional rights under the fourth and fifth amendments of the Constitution of the United States of America, and, upon the further grounds set forth in said petition on file herein, to which reference is hereby made as though expressly incorporated, to which ruling of the Court said defendant Marron duly and regularly excepted.

(c) Petition to suppress evidence with respect to overt act No. 11 as set out in said indictment and filed herein to which reference is hereby made upon the grounds that evidence had been secured by Federal Prohibition Agents as a result of the unlawful search and seizure occurring on the 3d of September at 2922 Sacramento Street, and that any evidence obtained by said unlawful [476] search and seizure could not properly be admitted in the trial of said cause and contravention of defendant Marron's constitutional rights under the fourth and fifth amendments of the Constitution of the United States of America, and, upon the further grounds set forth in said petition on file

herein, to which reference is hereby made as though expressly incorporated, to which ruling of the Court said defendant Marron duly and regularly excepted.

(d) Petition to suppress evidence made on behalf of defendants Birdsall and Mahoney, which petition was granted as to the defendant Birdsall and denied as to the defendant Mahoney and as to the other defendants named in said indictment; said petition being based upon the following grounds: That the search-warrant issued on the 2d day of October, 1924, and executed on the 3d day of October, 1924, was improperly issued for the reason that no probable cause existed for the issuance of said warrant on said date, and upon the further ground that no showing was made to the United States Commissioner who issued said warrant that there was probable cause for the issuance of same, for the reason that said warrant was issued upon the ground that a sale of liquor had been made at the premises known as 1249 Polk Street on the 27th day of September, 1924, and that since said 27th day of September, 1924, the premises known as 1249 Polk Street have been thouroughly searched on the 2d day of October, 1924, by Federal Agent Whittier, and at that time all intoxicating liquors had been removed therefrom, and that said Federal Agent Whittier executed said warrant on the 3d day of October, 1924, and knew of his own knowledge that the search of October 2d, 1924, had been thorough and complete, and had no reason to believe that grounds existed

for the execution and issuance of another search-warrant, to which said ruling defendant [477] Marron then and there duly and regularly excepted.

VI.

That Court erred in not granting the following motions made on behalf of the defendant George Birdsall, and prior to the time of the trial of said cause, which said motions were made on the —— day of ——, 1924, and which said motions are as follows:

(a) A plea in bar and a petition to suppress evidence with respect to overt act No. 5 as set out in said indictment and filed herein to which reference is hereby made on the ground that the matters and things set forth in paragraph five and overt act in said indictment are identical with the matters and things set forth in the information filed in the above-entitled court on May ——, 1924, information No. 15,-018, to which said information defendant Birdsall heretofore had pleaded guilty and satisfied fully judgment as rendered therein by reason thereof that defendant Birdsall had been once in jeopardy as to the matters and things set forth in said paragraph 5 of overt acts in said indictment, to which ruling of the Court said defendant Birdsall duly and regularly excepted.

(b) A petition to return property and to suppress evidence made upon the following grounds: that prohibition agents on the 2d day of October, 1924, acting under a purported search-warrant

authorizing them to search for and seize the following described property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers;

seized at the time that said search-warrant was executed certain personal property not authorized to be seized by said warrant, to [478] wit, certain other property, records and books of account, which private records, papers and books of account were and are the private and personal property of said defendant Birdsall; that said seizure was and is unlawful, unreasonable and unwarranted, and is and was in direct violation of defendant Birdsall's constitutional rights guaranteeed under the fourth and fifth amendments to the Constitution of the United States of America, and, upon the further grounds that said Federal Prohibition agents by reason of exceeding the authority vested in them by said warrant in the seizure of said records, papers and books of accounts, became trespassers *ab initio* and upon the following grounds as set forth in said petition to return property and sup-

press evidence on file herein, reference to which is hereby made as though expressly incorporated herein, and to which ruling of the Court said defendant Birdsall duly and regularly excepted.

(c) A petition to return property and to suppress evidence made upon the following grounds: That said Federal Prohibition Agents by reason of exceeding the authority vested in them by said warrant in the seizure of said records, papers and books of accounts became trespassers *ab initio* and upon the following grounds as set forth in said petition to return property and suppress evidence on file herein, reference to which is hereby made as though expressly incorporated herein, and to which ruling of the Court said defendant Birdsall duly and regularly excepted.

VII.

The Court erred in admitting evidence over the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 1, being a lease dated March 30, 1922, of the premises No. 1249 Polk Street by George Hawkins, the full substance of the evidence thus admitted being set out in the following extract from [479] the testimony of the witness Stevens on direct examination by counsel for plaintiff:

Q. Have you a record of leases, or contracts for leases on 1249 Polk Street during the years 1923 and 1924? A. Yes.

Q. Are they contained in these books that I have been showing you? A. Yes.

Q. Will you kindly turn to them.

A. Yes.

Q. At 1249 Polk Street? A. There.

Q. Have you one prior to this? A. Yes.

Q. The one to which you are now turning to do you know who signed that, Mr. Stevens?

A. It is signed by George Hawkins?

Q. Is that a lease for 1249 Polk Street?

A. Yes, for one month—on a month-to-month basis.

The COURT.—What is the date?

A. It is dated March 30, 1922, renting the premises on a month-to-month basis.

Mr. GILLIS.—I have a photostatic copy of this, and if you have no objection upon that ground I will ask that it be introduced evidence in place of the original, so that Mr. Stevens may take the book.

Mr. SMITH.—We will object to the introduction of the original upon the ground that it is immaterial, irrelevant and incompetent, there is no foundation laid for the introduction of it, there has been no conspiracy shown to have existed between Hawkins and any other of the defendants. Hawkins is absent, so we cannot interpose any objection for him. We do not know where Hawkins is, he is not a defendant here.

The COURT.—Objection overruled. Have you any objection to the photostatic copy being introduced instead of the original.

Mr. SMITH.—No, if it is a true copy we have no objection.

Mr. O'CONNOR.—On behalf of the defendant Mahoney we will object to its introduction on the ground that the instrument antedates the date the conspiracy is set forth in the indictment.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—I will ask that it be introduced in evidence and marked "U. S. Exhibit 1."

and to which ruling of the Court defendants duly and regularly excepted.

VIII.

The Court erred in admitting in evidence over the objection of the defendants, the following statement or document, to wit: U. S. Exhibit No. 2, being a lease on the premises at 1249 Polk Street, signed by Ed Marron dated November 2, 1923. The full substance of the evidence thus admitted is set out in the following extract from the testimony of the witness Stevens on direct examination by counsel for plaintiff:

Q. Now, the next lease that you turn to on 1249 Polk Street, Mr. Stevens, is signed by whom? A. Signed by Ed Marron.

Q. And what is the date of that?

A. November 2, 1923.

Mr. GILLIS.—We ask that that be introduced in evidence and [480] marked "U. S. Exhibit 2." I ask that the photostat be introduced in place of the original, if there is no objection to it upon that ground.

Mr. SMITH.—We will object to the introduction of that one offered upon the same grounds urged to the introduction of the first.

The COURT.—Overruled.

Mr. SMITH.—Exception. Now, we consent to the introduction, as long as the Court has so ordered, of the photostat copy.

To which ruling of the Court the defendants duly and regularly excepted.

IX.

The Court erred in overruling the objection interposed by the defendants to the following questions propounded to the witness Whittier on his direct examination by counsel for plaintiff:

Q. Did you go into 1249 Polk Street?

A. I did.

Q. Did you have a search-warrant for the place? A. We did.

Q. Did you find any liquor there at that time?

Mr. SMITH.—Just a moment, may it please the Court: The Court recalls that heretofore there have been several motions made for the exclusion of evidence. Now, will the Court consider as having been made, for the purpose of the record, a renewal of the motions at this time with reference to the raid of 1240 Polk Street on the 2d of October?

Mr. SMITH.—We object to the introduction of any testimony, or any evidence, upon the same identical grounds that we urge in our petition for the suppression of evidence;

that petition is on file, and is a part of the records.

The COURT.—Overruled.

Mr. SMITH.—Exception.

The COURT.—You may answer.

A. Yes, we found liquor there.

Mr. GILLIS.—Q. What did you find?

A. We found 16 pint bottles of champagne in a closet, in the front room, in a trap, and in that same little closet we found a gray ledger, a gray book, nine one-fifth gallon bottles of white wine, five one-fifth gallon bottles of whiskey, two quart bottles of whiskey, one one-fifty gallon bottle of gin three-quarters full, one-fifth gallon bottle full of gin, two bottles Bacardi rum, one one-fifth gallon bottle of brandy, two one-fifth gallon bottles of Scotch whiskey, one one-fifth gallon bottle one-half full Scotch whiskey, one bottle of Vermuth, one bottle picon, one-third full, one one-gallon bottle three-quarters full of gin, eight bottles sweet wine, one bottle one-third full of whiskey, one one-gallon bottle one-sixth full of sweet wine, two sacks of Canadian beer, and 174 bottles of home brew beer.

To which ruling of the Court the defendants duly and regularly excepted. [481]

X.

The Court erred in admitting in evidence over the objection of the defendants the following document, to wit: U. S. Exhibit No. 3, entitled, a ledger.

Q. I will show you a book, Mr. Whittier, and ask you to look at it; do not make any statements with reference to it until you have looked at it. A. That is the book.

Mr. GILLIS.—Q. I ask you if you recognize that book? A. Yes.

Q. When did you first see that book?

A. When we got—

Mr. GILLIS.—Q. When did you first see this book?

A. When we went in, Agent Howard and I went in to where we found the champagne in the closet, in the front room.

Q. It was on October 2, 1924? A. Yes.

Q. At 1249 Polk Street? A. Yes.

Q. Just where did you find this book?

A. In those premises, in that closet, there is a wash-stand, and this book was on the wash-stand under the cigar-box, with a lot of currency in it.

Q. Was the closet locked?

A. Yes, the closet was locked.

Q. Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms, was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. SMITH.—To which, of course, we will object.

The COURT.—You can ask your questions first.

Mr. SMITH.—Q. Mr. Whittier, I show you a paper, and I will ask you if you have ever seen that before?

The COURT.—What is that, the search-warrant?

Mr. SMITH.—That is the search-warrant.

The COURT.—The search-warrant that was served at the time?

Mr. SMITH.—Yes, it is a copy of the search-warrant, your Honor. Q. What is that paper.

The COURT.—It identifies itself. Do you want to put it in evidence?

Mr. SMITH.—No, I do not as yet. Q. It is a copy, is it not, of the search-warrant that you executed on the 2d of October, on 1249 Polk Street? A. Yes.

Q. You were fully advised as to the contents of the warrant at the time that you served it, were you not? A. We were.

Q. You know, do you not, that the search-warrant only authorized the search of those premises for certain liquors?

Mr. GILLIS.—I object.

Mr. SMITH.—I want to show this witness was thoroughly familiar with the contents of the warrant.

The COURT.—It does not make any difference whether he was, or not; if it was a valid search-warrant, authorizing the taking of this book, it speaks for itself; if not, it does not make any difference whether he knew it or not. [482]

Mr. SMITH.—As this time we will ask that all testimony elicited by the Government from this witness with reference to this gray book be stricken out on the ground that it is immaterial, irrelevant and incompetent, there is no foundation for it, and the warrant did not authorize the seizure of that record.

The COURT.—Was this included in your motion before?

Mr. SMITH.—Yes, your Honor, that was one of the motions.

The COURT.—Overruled.

Mr. SMITH.——May the objection, for the purpose of the record, show that this book was not described nor designated in the warrant as one of the things to be searched or seized?

The COURT.—The warrant is in evidence and speaks for itself.

Mr. SMITH.—I want the record to show what my objections are.

The COURT.—Yes.

Mr. SMITH.—Furthermore, in the case of United States vs. Goulin, the Supreme Court of the United States held that a man's records, or books, or papers could not be used as

evidence against him, because it would be tantamount to telling the man to take the witness-stand against himself; in either event, whether his records are used, or whether he is compelled to take the stand as against himself, he is an unwilling source of information concerning his actions. Now, we submit that it is directly in violation of his constitutional guarantee; that is the second ground. The first ground is that it was unlawfully taken under the warrant.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. SMITH.—May the record show an exception to all of your Honor's rulings?

The COURT.—Yes.

Q. Did you have any conversation with Mr. Birdsall at that time? A. Yes.

Q. What was that conversation?

A. He stated that he owned the place, and gave the name of Howard.

Q. At that time.

A. Yes; he stated he owned the place; he said that he bought it out recently from Marron.

Q. Anything else? A. Not at all.

Q. Did you have any talk with him at all with reference to the book that has been introduced in evidence?

A. He wanted us to leave the book, did not want the boys to take the book; I left the book on the dining-room table while I was

making out the warrant, and Howard, I believe, grabbed the book up at the time to hold it, and he said, "Can't you leave the book here?" and I said, "No, we have to take it."

The COURT.—Let the search-warrant be marked in evidence as having been used upon Mr. Smith's objection.

Mr. SMITH.—Let the record show that the copy of the search-warrant was introduced in evidence by the defendant first.

(The copy of the search-warrant was marked "Defendants' Exhibit 'A.' ")

To which ruling of the Court the defendants duly and regularly excepted. [483]

XI.

The Court erred in permitting counsel for plaintiff over the objection of the defendants to read to the jury the contents of the book, the full substance of which is set out in the following:

Mr. GILLIS.—Gentlemen of the jury, I call your attention—

Mr. SMITH.—Just a moment: may it please the Court, at this time I will object on behalf of the defendants that I represent to the contents of this book being read to the jury, for the reason that no foundation has been laid, and upon the further ground that it is immaterial, irrelevant and incompetent; there has been nothing done with the book to identify it or show what the entries are, or anything of that sort.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—As to the defendant Mahoney, it is objected to on the ground it is hearsay.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

(Thereupon a short recess was taken.)

Mr. GILLIS.—I will call your attention, gentlemen, to a few of the things in this book; for instance, on page 21 I call your attention to the fact, first, of an item here, "E. Marron, $500, rent $100, W. Brand $400." Then on page 31 we have "W. Brand $408.97, E. Marron $603.08." Then we go to page 36, and we have at the top here, "Bird," with a list of notations under it, and here, lower down, "18/23, Birdsall drew," with "20" after it, crossed out "Drew" underneath that, "20, 20, 20." On page 46 we again have the name "Birdsall." On page 46 we again have the name "Birdsall." On page 54 we again have the name "Birdsall, Mahoney," with different items listed underneath. On page 71 abbreviated, "Bird" and 'Mah" on the other side; "Mahoney" written out there. Page 69, we have "Birdsall, Mahoney, Birdsall, Birdsall." On 75 we have "Mah" again, and "Bird"; here are two Birdsalls; on 81 we again have "Mah" and "Birdsall," 98 again the same thing appearing, "Mah" and "Bird"; on page 93 the same, listed in the same way; 99, a similar notation; on 105 we have "Geo." and

"Chas." there, the first name. I call your attention to page 107 on which appears a summary of the profit and loss for September, 1924, showing sales of $5,624.50, cigar sales $5.65, slot machines $254, total $5,884.15, with a gross profit of $2,552.55, and expenses, salaries, rents, and then a blank space filled with cross-marks, $170, profit $1,187, and we have then the initials, "E. M. $600," "balance to divide, $587.10"; again, "one-half E. M. $293.55, one-half G. B. $295.55." Then I will call your attention to page 34, an item in the center of the page after "17/23," which is marked "Gift Kissane," and above the word "Kissane" is written the word "Police." Then on page 51 we have the word in the center of the page, "Police $100, and the word "Kissane $5." On page 60 we again have Kissane on the 10th, $5; on page 68, for March, we again have on March 23, "Kissane $5"; 9th, "Kissane $5"; [484] on the 16th, $5, on the 23d, $5; and on the 30th, "Kissane $5."

On page 74, for the month of April, we have on the 6th, "Kissane $5," on the 13th marked "Gift $5," on the 20th "Gift $5," on the 27th "Kissane $5."

On page 80 for the month of May we have on the 4th, $5, on the 11th $5, on the 25th $5, and on the 17th "Kissane $5."

Then on page 86, for the month of June, we have on June 1, "Kissane $5," on the 8th,

"Kissane $5," on the 15th "Kissane $5," on the 22d, "Police $15."

On page 92 for July, we have on the 6th, "Kissane $5," on the 13th "Kissane $5," on the 20th, "Kissane $5," on the 27th, "Kissane $5."

On page 98 for the month of August we have on the 3d, "Kissane $5," on the 10th, "Kissane $5," on the 16th "Kissane $5," and on the 24th "Kissane $15."

On page 104 for the month of September we have on the 21st, "Kissane $15," on the 28th "Kissane $5."

Now, I call your attention to page 69, and an item marked on page 69, toward the bottom of the page, "Gift, $60," and underneath, as a matter of fact, the last item—this is for March, 1924, "New Police, $90."

On page 74 we have "Gift $90," on the 16th, and on the 27th we have "Gift $60."

On page 80 we have "Police, on the 22d, $90," and on the 26th "Police $60."

On page 86 we have on the 14th of June, "police $150."

On page 92 we have "Gift $150."

On page 98 we have "Gift Pl. $150." That is August 11.

On page 104, September 15, we have "Gift $150."

I call your attention to page 103, which gives a list of the stock that they had on hand

at the end of September of that year, including whiskey, rum, sherry and gin.

I call your attention to page 101, which is the profit and loss statement for August, 1924, showing a net profit of $796.95, E. M., $620, Balance $176.65; Underneath that "1/2 E. M. $88.33, 1/2 G. B. $88.32." The same kind of a recapitulation for July, 1924, on page 94; also on page 71 for the month of March which is a stock account, showing the different stock on hand at the end of March.

On page 64, February 29, Stock on hand, including bourbon, Scotch, rye, *Plymoth* gin, Vermuth, Brandy, beer, Sherry.

Mr. O'CONNOR.—At this time, if your Honor please, I ask the Court to instruct the jury to disregard the items read from the book by Mr. Gillis as to the defendant Mahoney on the ground that they are immaterial, irrelevant and incompetent, hearsay, no foundation laid for their introduction, and that there has thus far not been established *prima facie* case of conspiracy as to the defendant Mahoney.

The COURT.—Motion denied.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—I will ask for the same instruction with reference to the defendant Marron, also the defendant Birdsall. [485]

The COURT.—The same ruling.

Mr. SMITH.—And upon the further ground that the record, itself, discloses nothing that is connected with the thing that is

alleged to be a conspiracy; there is nothing to connect the record that has been read with the conspiracy that is charged.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. GILLIS.—One item that has been called to my attention, I still wish to call to the attention of the jury in this gray book, on page 92, the name "Gorham" appears, $60, with some lines drawn through it; on the top of page 93 *"Gorman,* $60," and on the same page, "Joe Gorham, $60.

Mr. O'CONNOR.—If your Honor please, I renew the motion I made as to the other items as to these items, with the understanding that it is overruled and an exception noted.

The COURT.—Yes.

Mr. SMITH.—May my motion be renewed in a like manner?

The COURT.—Yes.

XII.

The Court erred in admitting in evidence over the objection of the defendant U. S. Exhibits Nos. 4, 5, 6, 7 and 8 for identification, being bottles.

Mr. SMITH.—These are objected to on the ground that they are incompetent, irrelevant, immaterial and not binding upon the defendant Marron.

The COURT.—Overruled. [486]

Mr. SMITH.—We note an exception as to each ruling on behalf of defendants Birdsall and Marron.

To which ruling the defendants duly and regularly excepted.

XIII.

The Court erred in admitting into evidence over the objection of the defendants the testimony of Stephen V. Keveney, with reference as to what occurred at 1249 Polk Street during the months of June or July, 1923. The full substance of the evidence is more fully set out in the following extracts from the testimony of witness Keveney under direct examination by counsel for the plaintiff:

Q. In June of July, 1923, did you ever have occasion to visit 1249 Polk Street?

Mr. O'CONNOR.—That is objected to on the ground it is immaterial, irrelevant and incompetent, and in no way connected with the conspiracy charged in this indictment.

The COURT.—I do not see your point.

Mr. SMITH.—There is no foundation laid for the introduction of this testimony, and we object upon the ground that none of the defendants upon trial here have been shown to have had any connection at the time designated by the Government's attorney.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Did you purchase any drinks in June, 1923, intoxicating liquor, in that place?

Mr. SMITH.—The same objection.

The COURT.—The same ruling. [487]

Mr. SMITH.—Exception.

A. I did.

Mr. GILLIS.—Q. Whoe did you purchase it from? A. George Hawkins.

Q. What was the kind of liquor that you purchased?

A. I purchased four drinks of whiskey, and a bottle of whiskey.

Q. Did you visit the place in July?

A. I did.

Q. What time in July, do you remember?

A. July 3, 1923.

To which ruling defendants duly and regularly excepted.

Q. Did you purchase any intoxicating liquor there at that time? A. I did.

Q. And from whom? A. George Hawkins.

Q. What was the liquor you purchased?

Mr. SMITH.—Objected to on the ground it has been asked and answered.

The COURT.—This is another occasion.

Mr. GILLIS.—Yes.

Mr. SMITH.—What was the date of the first?

Mr. GILLIS.—In June.

A. Whiskey was purchased on that occasion.

To which said ruling the defendants duly and regularly excepted.

XIV.

The Court erred in overruling the motion of defendants Marron and Birdsall to strike from the

record all of the testimony of witness Keveney, upon the ground that it is immaterial, irrelevant and incompetent, and in no way connected with any of the defendants who are here on trial, this testimony relating to the conduct of the premises known as 1249 Polk Street at a time when several other defendants before the bar are alleged to have been in no way connected with them; to which ruling of the Court said defendants then and there duly and regularly excepted. [488]

XV.

The Court erred in sustaining the objection made by counsel for the defendants to the following question propounded on behalf of defendants Marron and Birdsall:

Mr. SMITH.—Q. Did you make any notes of the incidents that evening, other than the case report that you say that you made out?

A. No.

Q. Was there ever any prosecution based, if you know—

Mr. GILLIS.—Just a moment—

Mr. SMITH.—Let me finish the question.

Mr. GILLIS.—Finish it up.

Mr. SMITH.—Q. Was there ever any prosecution based, if you know, upon the purchase made by you at that time?

Mr. GILLIS.—The record is the best evidence of that, and I object to it on that ground.

Mr. SMITH.—I am asking if he knows.

The COURT.—It does not make any dif-

ference if he knows or not. The record is the best evidence. Sustained.

Mr. SMITH.—Q. Did you ever go to a United States Commissioner for the purpose of securing a search-warrant based upon that purchase?

Mr. GILLIS.—I think that is entirely immaterial and irrelevant.

The COURT.—Sustained.

To which ruling the defendants Marron and Birdsall then and there duly and regularly excepted.

XVI.

The Court erred in refusing to strike from the record the entire testimony of the witness George H. Neary, which testimony is as follows: [489]

CALLED FOR THE UNITED STATES:

Mr. GILLIS.—Q. Your position is what, Mr. Neary? A. Used car business.

Q. You were connected with the Government as a prohibition agent for some time, were you not? A. For 2½ years.

Q. Were you a prohibition agent on May 15, 1924? A. Yes.

Q. On that date did you have any occasion to visit 1249 Polk Street? A. Yes.

Q. Did you go there with a search-warrant?

A. Yes.

Q. What did you find?

A. We found 44 quarters of wine, two gallons of gin, one gallon jug half full of whiskey, three sacks.

Mr. SMITH.—What was the date?

Mr. GILLIS.—May 15, 1924.

upon the ground that the defendant Birdsall had been once in jeopardy as to the matters testified to by Mr. Neary; that in action No. 15,018, defendant Birdsall was charged with violating the National Prohibition Act, pleading guilty to the information in its entirety, judgment was imposed and judgment was wholly set; defendant Birdsall having fully answered to the Government for any infraction of the law of which he might have been guilty, to which order of refusal, defendants Marron and Birdsall then and there duly and regularly excepted.

XVII.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony given by Federal Agent Lee:

Mr. GILLIS.—Q. Were you present at that place on October 3, 1924?

The COURT.—That is evidence seized on October 3d?

Mr. SMITH.—Yes.

A. Yes, I was present on the raid of October 3d.

Q. Did you assist [490] in searching the premises at that time? A. I did.

Q. What did you find?

A. Well, we found liquor, but not as much as on the first raid.

Q. Do you know how much you found?

A. Yes, I have a list of it here. Do you want me to read it?

Q. Yes.

A. Two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey, one bottle containing two ounces of whiskey one bottle three-quarters full of brandy, one bottle half full of Scotch whiskey, one bottle one-third full of Vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of Bocarde rum, one bottle of Bocarde rum, nearly full, two sacks of Canadian beer. That was all, I guess; that is all I have.

The COURT.—Had you cleaned out the place on the 2d of October? A. Yes.

Q. You found this liquor on the 3d?

A. We found this the next day. *A.* We arrested a defendant by the name of Charles Clark, who afterwards proved to be Mahoney.

Q. Is that a defendant in this case?

A. Yes; he gave the name of Charles Clark at the time of arrest.

Mr. GILLIS.—You may cross-examine.

Mr. O'CONNOR.—Q. After you arrested the defendant who gave the name of Charles Clark, what did you do with him?

A. He was booked at the Bush Street police station.

Q. Did you leave him there at the Bush Street police station? A. Yes.

Q. What charge did you book him under?

A. National prohibition.

Q. Violation of the National Prohibition Act? A. Yes.

Mr. GREEN.—Q. Whom did you arrest on the raid of October 2? A. George Birdsall. [491]

Mr. O'CONNOR.—That is all.

Mr. GREEN.—That is all.

the basis of the objection on the part of defendant Marron being that said evidence was obtained under the execution of a search-warrant that had been improperly issued, i. e., without probable cause having been first shown to exist for its issuance. That upon defendant Birdsall's petition for the suppression of the evidence thus obtained, the Court granted the motion of defendant Birdsall, but denied it as to the defendant Marron, to which ruling of the Court the defendants then and there duly and regularly excepted.

XVIII.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony:

Mr. GILLIS.—Q. Mr. Whittier, were you present at 1249 Polk Street on October 3, 1924?

A. I was.

Mr. GILLIS.—Q. What did you find in the way of liquor, if anything?

A. Two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey,

one bottle containing two ounces of whiskey, a bottle three-quarters full of brandy, one bottle one-half full of Scotch whiskey, one bottle one-third full of vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of Bacardi rum, one bottle Bacardi rum nearly full, two sacks of Canadian beer.

Q. I show you bottle numbered 27,999, and ask you if that is one of the bottles that you secured at that time at that place? A. Yes.

Q. Was that delivered to the United States Chemist? A. It was.

Mr. GILLIS.—I ask that that be introduced for identification. [492]

(The bottle was marked "U. S. Exhibit 9 for Identification.")

Q. And was that delivered to the United States Chemist? A. Yes.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 10 for Identification.")

Q. I show you bottle 28,001 and ask you if that was taken from that place that time?

A. Yes.

Q. And was that delivered to the United States chemist? A. It was.

Mr. GILLIS.—I ask that that be introduced for identification.

(The bottle was marked "U. S. Exhibit 11 for identification.")

Q. I show you bottle numbered 28,002, and

ask you if you secured that at that time at that place? A. I did.

Q. You delivered that to the United States chemist, did you? A. Yes.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 12.")

Q. I show you bottle 28,003, and ask you if that was secured at that time at that place?

A. Yes.

Q. Was that delivered to the United States chemist? A. Yes, it was.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 13 for Identification.")

Q. I show you bottle 28,004, and ask you if that was secured at that time at that place?

A. Yes.

Q. And you delivered that to the United States chemist? A. Yes.

the basis of the objection on the part of defendant Marron being that said evidence was obtained upon the execution of a search-warrant that had been improperly issued, i. e., without probable cause having been first shown to exist for its issuance. That [493] upon defendant's Birdsall petition for the suppression of the evidence thus obtained the Court granted the motion of defendant Birdsall, but denied it as to the defendant

Marron, to which ruling the defendants then and there duly and regularly excepted.

XIX.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony of Agent Whittier in the document marked as U. S. Exhibit No. 16:

Mr. GILLIS.—Q. I show you another piece of paper, Mr. Whittier, and ask you to examine that without comment.

Mr. O'CONNOR.—The same objection as to the defendant Mahoney.

Mr. GILLIS.—Q. Do you recognize that, Mr. Whittier? A. I do.

Q. Where did you get that?

A. The same room.

Q. You mean by that at 1249 Polk Street?

A. 1249 Polk Street.

Q. On October 3d? A. On October 3d.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The document was marked "U. S. Exhibit 15 for Identification.")

The grounds urged in opposition to the introduction of evidence was as follows:

Mr. O'CONNOR.—Objected to on behalf of the defendant Mahoney as irrelevant, immaterial and incompetent, and no foundation laid for its introduction in evidence.

Mr. SMITH.—As far as the defendants Marron and Birdsall are concerned, we will object to its introduction upon the ground

that no foundation has been laid, that there is no identification of the particular instrument, that there is nothing to show that what appears on it is authentic, or that it represents any particular thing in connection with this particular case, and, in addition thereto, it is not one of the things that was authorized to be seized by virtue of the search-warrant that was issued on that date, and was seized in excess of authority. [494]

to which ruling of the Court the defendants duly and regularly excepted.

XX.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony and documents:

Mr. GILLIS.—I ask that that be introduced in evidence and marked "U. S. Exhibit 16."

Mr. GILLIS.—I show you five small slips of paper and ask you to look at them without comment.

Mr. GILLIS.—Q. Do you recognize these, Mr. Whittier? A. I do.

Q. Where did you get these?

A. Out of the book.

Q. When you refer to the book, you mean the gray book, Government's Exhibit 3?

A. That is it.

Q. And they were in this book when you first saw them? A. Yes.

Mr. GILLIS.—I ask that these be introduced in evidence and marked "U. S. Exhibit 17."

(The documents were marked "U. S. Exhibit 17.")

Mr. GILLIS.—Q. When you have referred to the gray book in your previous testimony, Mr. Whittier, you refer to this book that I have now in my hand, Government's Exhibit 3?

A. Yes.

the grounds urged in opposition to the introduction of evidence being the same as urged in the preceding assignment of error, and to which ruling defendants duly and regularly excepted.

XXI.

The Court erred in sustaining the objection interposed by the plaintiff to the following question propounded to the witness Whittier on his cross-examination:

Mr. SMITH.—Q. Mr. Whittier, you are the Agent Whittier who executed the search-warrant on October 2, 1924, at these premises?

A. Yes.

Q. And you are the agent who executed the search-warrant [495] on these premises on October 3d? A. Yes.

Q. Did you know of your own knowledge that there had been any violation of the law there subsequent to the first raid?

The witness Whittier executed the search-warrant on 1249 Polk Street on both occasions, i. e., October 2, 1924, and October 3, 1924. The question asked indicated that on behalf of the defendants Marron and Birdsall counsel attempted to show that there was no probable cause for the

issuance of the warrant which was executed on the 3d of October, 1924; to which ruling defendants then and there duly and regularly excepted.

XXII.

The Court erred in admitting over the objection of the defendants Marron and Birdsall the following testimony:

Q. Where did you go?

A. 3047 Sacramento Street.

A. Sacramento, or California?

A. California.

Q. Do you know who lived there?

A. The premises were occupied by a man named William F. Curran.

Q. What did you find or see when you arrived there?

Mr. O'CONNOR.—Exception.

The COURT.—You may answer.

A. I found a large quantity of liquor contained in the garage underneath his residence.

Mr. GILLIS.—Q. Have you a list of the liquor that you seized?

The COURT.—The objection will be overruled. I assume that this will be connected in some way with the defendants.

A. In the garage at this time were 398 sacks containing what we presumed to be beer, 21 sacks presumed to contain whiskey, 7 sacks of whiskey partly filled, 11 cases of whiskey, three cases of champagne, three cases of champagne partly filled, two barrels of wine, one barrel of wine part full— [496]

A. Shall I continue with a description of the property taken?

Mr. GILLIS.—Yes.

A. Two barrels of brandy, two part-full barrels of brandy, one 50-gallon tank of alcohol, one 5-gallon jug of wine part full, two 20-gallon stills, and an empty barrel.

Mr. GILLIS.—Q. Did you seize the liquor at that time?

A. No, we entered the premises for the purpose of making a sanitary inspection; when we found that the liquor was contained therein we called the Federal Prohibition Agents Shurtleff and William F. Gwynn—no, Federal Agent Shurtleff and William F. Gwynn was the owner of the premises. He admitted us to the runway, from which position we could observe the contents of the garage.

The COURT.—That is, Mr. Gwynn admitted you there, you mean?

A. Yes, into the alleyway. He admitted us for the purpose of making the sanitary inspection.

Mr. GILLIS.—Was that Mr. Gwynn the agent or the owner of the property?

A. He is the owner of the property.

Q. You said a moment ago Curran was.

A. I will have to go back on that. The Federal Agents were A. R. Shurtleff and William F. Gwynn. The owner of the property was William Curran; he admitted us.

Q. Now, I will ask you Captain Coulter, if

on September 2, 1924, you had occasion to communicate with the prohibition department of this city, the National Prohibition forces?

A. On what date?

Q. On September 2d. A. No, I did not.

Q. What date did you, on or about that time?

A. September 3d.

Q. On September 3d? A. Yes, 1924.

Q. What was the occasion of your communicating with the Prohibition Department at that time? A. On September 2d—

Q. (Intg.) Without stating any conversation between yourself and your officers.

A. On September 2d, about 7:20 P. M., I was [497] attending a meeting of the Board of Police Commissioners at the Hall of Justice, when I was communicated with by one of the officers of my company, who informed me that he had been informed by—

Mr. GILLIS.—Q. Without stating what the information was, you received certain information from one of the officers of your company? A. Yes.

Q. Did you issue any orders upon that report from your officer? A. I did.

A. What were those orders?

Mr. O'CONNOR.—I object to that on the ground it is hearsay and not binding upon any of these defendants.

The COURT.—You can state it generally; objection overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—Q. You were acting in your official capacity as a captain of police in charge of that district at that time?

Mr. O'CONNOR.—That is objected to on the ground it is leading and suggestive.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—Q. Now, I will ask what orders were issued by you?

A. I communicated with the platoon commander at the Western Addition station, and ordered him to blockade these premises and to permit nothing to be taken in or out of the same until the following morning.

Mr. GILLIS.—Q. What premises were those? A. 2922 Sacramento Street,

The COURT.—This was a different place from the one you spoke of before? A. Yes.

Mr. GILLIS.—Q. Now, on September 3, did you communicate with the Prohibition Department of this city?

A. Yes, I notified Federal Agent Rinckel.

Q. Did you go to 2922 Sacramento Street?

A. No, I did not.

Mr. GILLIS.—That is all. [498]

the objections of Marron and Birdsall being based upon the fact that all evidence obtained from the witness Coulter was obtained from the witness Coulter by reason of an unlawful search and seizure while acting in conjunction with Federal Prohibition Agents as shown by the testimony of Captain Coulter when he referred to Federal Chief

Field Agent Paget when undergoing cross-examination by counsel for Marron and Birdsall, which is as follows:

A. He said, "Well, I am very glad to cooperate with you, I will send out a couple of men." I said, "That is all *was* want."

Mr. SMITH.—Q. Captain Coulter, after the arrival of the prohibition officers on the scene—you say they arrived on the scene about the same time as you? A. Yes.

Q. What was said by the officers to you, and what did you say to them, and what was done by them?

A. Well, upon their entrance to the garage, we looked over the property contained therein, and I advised them that we had no further jurisdiction in the matter, that the seizure of the liquor was strictly up to them, but I would leave an officer there to take a memorandum for my information, showing what was taken out of that garage that day; that report was submitted to me by one of the officers, the report of which I have given to you.

Q. Then, with reference to the seizure of this property you had nothing to do, other than what you have stated? A. That is all.

Q. The entire seizure was made by the prohibition officers: Is that correct? A. Yes.

Mr. GILLIS.—I object to that as calling for the conclusion of the witness. Let the facts speak for themselves.

The COURT.—I suppose that calls for a fact. He is asking him, in effect, what was done with regard to taking the liquor. [499] I will allow the question.

Mr. SMITH.—Q. You never at any time took this liquor into your custody, did you?

A. What is that?

Q. You never at any time took this liquor into your custody, did you? A. No.

Q. You never exercised any control over it?

A. None whatever.

Q. Mr. Paget remarked, as you say, that he was very glad that you were co-operating with him?

A. He would be very glad to co-operate with me in the matter.

Q. Thereafter, whatever was done was done by the prohibition agents? A. Everything.

to which ruling the defendants duly and regularly excepted.

XXIII.

The Court erred in refusing to strike from the record all of the testimony given by witness Coulter for the reasons set forth in the foregoing assignment of errors, to which ruling of the Court the defendants then and there duly and regularly excepted.

XXIV.

The Court erred in overruling the objection interposed by the defendants to the following question propounded to the witness Vaughan:

Mr. GILLIS.—I show you Government Exhibit No. 3 and ask you to just glance at that and see if you recognize it without any comment.

Mr. SMITH.—We will object to all of the testimony of this witness on the ground that it is improper under the Gouled case decision, which goes directly to the point I am making now, i. e., a man's records cannot be used against him in a criminal proceeding, any more than he could be compelled to testify against himself [500] because in either event he would be an unwilling source of evidence as against himself.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. SMITH.—We will object to all of this testimony on the ground that it is improper under the Goulet decision; the Goulet case goes directly to the point that I am making now, that is a man's records cannot be used against him in a criminal proceeding any more than he could be compelled to testify against himself, because in either event he would be the unwilling source of evidence as against himself. The Supreme Court has passed directly upon that point, and I respectfully urge it at this time.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Q. Do you recognize this book? A. Yes, I do.

Q. I will show you a sheet of paper and ask you if you recognize that, Mr. Vaughan, Government's Exhibit 16. A. Yes.

Q. No, Government's Exhibit 16, do you know whose handwriting that is, Mr. Vaughan?

A. Yes, that is mine.

Mr. SMITH.—That is objected to upon the ground it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. GILLIS.—If you know? Do you know? A. Yes.

Q. Whose handwriting is it?

A. My own.

Q. You made that summary, did you, Mr. Vaughan? A. Yes.

Mr. GILLIS.—Q. From what was that Government's Exhibit 16 made, Mr. Vaughan?

A. From this book here.

Q. From Government's Exhibit 3?

A. Yes, the book.

Q. Now, can you look at that book and say when you first began keeping the account or keeping the summary?

A. I will say about [501] the early part of March. The February totals are my figures.

Q. The February totals are your figures?

A. Yes.

Q. From that time on until the end of September, until the September statement was

made up, did you make the summary from the book each month?

A. I think so, yes.

Q. I notice the first item here on page 86 is June, at the top of the page "Vaughan": That is your name? A. Yes.

Q. $10? A. Yes.

Q. That item was made by you? A. Yes.

Q. That was your monthly charge for making these up? A. Yes.

Q. If you will, turn to page 81, please, Mr. Vaughan. Calling your attention to three cross-marks on page 81, opposite which are the figures $170, will you explain to the jury the significance or the meaning of those three cross-marks?

Mr. SMITH.—Just a second. Where are the cross-marks you have reference to?

Mr. GILLIS.—There, Mr. Smith.

Mr. SMITH.—We will object to the question upon the ground that it is assuming something that is not in evidence, and, furthermore, that this witness has not heretofore testified that the cross-marks signify anything.

The COURT.—Q. Do you know what they signify?

A. There are certain items here that—

Mr. GILLIS.—Just answer the Court's question: Do you know what they signify?

A. I know the items, but I don't know exactly what the payments represent.

Q. Do you know what go to make up the

figures that are opposite those three cross-marks?

A. Yes, the items I can pick out here.

The COURT.—He may answer.

Mr. GILLIS.—Q. What are the items that went to make up the $170 opposite the three cross-marks? [502]

The COURT.—Let me see that. Which ones do you refer to?

Mr. GILLIS.—These.

The COURT.—Q. Is this your own summary, in your handwriting? A. Yes.

Mr. GILLIS.—Q. That is your own summary? A. Yes.

The COURT.—You may explain what the three cross-marks mean.

A. They are items marked here, "Kissane" and "Police" items, these items.

Q. Kissane and Police? A. Yes.

Q. Did you have any instructions from Mr. Birdsall with reference to making up that particular item? A. Why, I think I did, yes.

Q. What were those instructions?

A. Well, to make them up in one total, as I have shown them here.

Q. What was to go in that total?

A. Just those items marked "Police," "Kissane," and "Gift," or something of that character.

Q. "Police," "Kissane," and "Gift"?

A. Yes.

The COURT.—Q. Did he tell you why to put down just simply crosses instead of what the items really were?

A. No, I do not recall any specific instructions. He said just to show these items separately, but I do not recall now any instructions.

Mr. GILLIS.—Q. Now, calling your attention to the same Exhibit 3, page 87, the summary on that page, Mr. Vaughan, is in your handwriting? A. Yes.

Q. Those three cross-marks with the figures $195 are in your handwriting? A. Yes.

Q. Can you tell from the book what items in the month of June accounts *when* to make up the $195? A. Well, the same items.

Q. The same items? A. Yes.

Q. Calling your attention to page 94 for the month of July, 1924, that summary on that page is in your handwriting? A. Yes. [503]

Q. And the four cross-marks with the $180 opposite is made up of the same items, Kissane, Police, and Gifts? A. Yes.

Q. Calling your attention to page 101, that summary on that page being for August, 1924, is in your handwriting? A. Yes.

Q. And the three cross-marks with the $180 opposite that figure are made up from the items, Kissane, Gifts and Police? A. Yes.

Q. And on page 107 that summary is made up in your handwriting? A. Yes.

Q. And the five cross-marks with the figures $170 opposite, for the month of September,

1924, that figure is made up from the total of the three items, Kissane, Police and Gifts, for the month of September? A. Yes.

Q. Now, this Government Exhibit 16, just what does that represent, Mr. Vaughan, what is it a statement of?

A. From the books for the month of September, the totals.

Q. Is that a profit or loss statement?

A. Yes, it is intended for that.

Q. For the business that was carried on there, according to the book, for the month of September? A. Yes.

Q. 1924? A. Yes.

Q. Now, I call your attention, Mr. Vaughan, to pages 80 and 81, at the top of page 80 under date of May 19, 1924, I call your attention to the item, "Gov. fine $500"; then on the opposite page 81 there is written "½ fine, $250." Is that in your handwriting? A. Yes.

Q. Will you tell me what that indicates?

A. One-half of the item shown over here, the $500.

Q. One-half of the item of $500 that I have just read on page 80? A. Yes.

Q. And is that chargeable to some individual?

A. Yes, it appears [504] that way.

Q. Who was it chargeable to?

A. To Birdsall. It says, "Bird"; I presume it was Birdsall.

The COURT.—What was that $500 for?

A. Well, it says there "Gov. Fine."

The COURT.—What is "Gov."?

Mr. GILLIS.—It stands go—

Mr. SMITH.—Just a second, we will object to that.

The COURT.—Do you know?

Mr. GILLIS.—It is very plain what it stands for. I will let your Honor look at it.

The COURT.—Where is "Gov. Fine"?

A. Up at the top of the page.

Mr. GILLIS.—Q. Now, what time of the month did you usually go there to make up these books, Mr. Vaughan?

A. Well, the 1st, or as soon after as I could —I think it was around the 1st.

Q. Who did you see when you went there?

A. Well, I think I usually saw Birdsall there.

Q. Did you talk with him occasionally about the making up of the different items in the book?

A. Well, I don't know of any conversation we had after I once got started; I usually just went ahead the same as the preceding month.

Q. Did you ever see Mr. Eddie Marron there?

A. Yes.

Q. Where did you go there in the flat, what part of the flat did you go into when you made the summary?

A. Usually in the front room, there.

Q. Did Mr. Birdsall and Mr. Marron go in with you there?

A. Occasionally I would say they had been in the room when I was working on it, maybe not

continuously; probably there were times when they were not present.

Q. Occasionally one would be present and sometimes both of them? [505] A. Yes.

Q. That went on up to the time that you made the last statement for the month of September? A. Yes.

Q. When you first went there, Mr. Vaughan, who gave you this book?

A. Well, I don't know; I presume Birdsall handed it to me when I first started in.

Q. Was he the first man that you took it up with with reference to keeping the books?

A. Yes.

Q. You received your instructions from him at that time with regard to the salary you were to receive and what you were to do? A. Yes.

Q. Look at Government's Exhibit 16, which is the September profit and loss statement, Mr. Vaughan. I would like the jury to get a view of this at the same time. You have got an item there, "Slot machine, $254."

Mr. SMITH.—Just a second. We will object to that on the ground it is purely immaterial, irrelevant, and incompetent. The defendants here are not charged, or any of them charged with maintaining slot machines, and I assume that the question is simply asked for the purpose of prejudicing the jury in the consideration of the evidence.

Mr. GILLIS.—I will say it is not, Mr. Smith.

Mr. SMITH.—We will object to it on the ground it is highly improper.

The COURT.—It shows the relations between these parties, I do not think the jury is going to convict these men of conspiracy because they had slot machines there, but the financial arrangements, division of the money, are all matters to be considered in connection with the charge that they conspired. I will overrule the objection.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Q. Where did you get the items to make up the figure $254, Mr. Vaughan?

A. Isn't it in the book, there?

Q. Glance back and see. A. There it is.

Q. You received that from page 106, which would be the summary [506] for September. A. Yes, September.

Q. Now, I call your attention to an item of "salaries $840." Do those salaries appear in that book, or were you given that amount.

A. I will look in the book, I don't recall all the details. Here is part of it. As I recall it, $20 a day was charged for Birdsall.

Mr. SMITH.—I will ask that that go out as being immaterial, irrelevant and incompetent, and not responsive to the question. He was asked about a particular item. Will you read the question, Mr. Reporter.

The COURT.—I remember the question. He was asked what went to make up the item

of salaries, and the answer was $20 a day was paid to Mr. Birdsall. The motion is denied.

Mr. SMITH.—Exception.

A. (Continuing.) And this item marked "Charles, $240," makes $840.

Mr. GILLIS.—Q. Who was Charles?

Mr. O'CONNOR.—If he knows.

Mr. GILLIS.—Q. If you know.

A. There was a fellow there by the name of Charles, and I presume it was paid to him.

Mr. O'CONNOR.—I ask that his presumption go out.

Mr. GILLIS.—Q. Did you know any other employee there on the premises, Mr. Vaughan?

A. Did I know any?

Q. Yes. A. This fellow Charles.

Q. Did you know him?

A. Well, I met him there.

Q. Did you know his last name? A. Yes.

Q. What was his last name?

A. Mahoney.

Q. Does the word Charles refer to that individual, if you know?

Mr. O'CONNOR.—That has been asked and answered.

A. As I said before, I presume so, but I did not see the money paid, or anything like that.

Q. Do you know if there were any other employees there except Mr. Mahoney?

A. Nobody else that I know of. [507]

Q. Now we drop down, Mr. Vaughan, to the two letters here, "E. M.," with the

figures "600" opposite them. Do you know what these two letters "E. M." refer to?

A. Yes, E. Marron.

Q. And the $600?

A. That was his payment there for September, the amount he received in September.

Q. Now, we drop down below and we find "E. M. Proportion $293.55, G. B. proportion $293.55"; do you know what the latter "E. M." refers to? A. E. Marron.

Q. And "G. B."? A. G. Birdsall.

Q. And what do those two items refer to or represent?

A. That shows the balance there of $587.10 after charging off the $600, taking that away from it, and then that was divided up equally.

Q. Did you receive any instructions from anyone there with reference to the manner in which these figures should be set down and deducted? A. Yes.

Q. Who gave you those instructions?

A. Mr. Birdsall.

Q. What did he say with reference to the $600, as to when or where it was to be taken out?

A. After the expenses had been deducted from the receipts, then that amount should be deducted and the balance divided between them.

Q. Do I understand that from the net proceeds the defendant Marron was to receive $600 and after that $600 had been deducted

that the balance was to be divided equally between Eddie Marron and George Birdsall—

Mr. SMITH.—Just a second.

Mr. GILLIS.—Q. (Continuing.) Is that correct?

Mr. SMITH.—Have you finished?

Mr. GILLIS.—Yes.

Mr. SMITH.—We will object to that on the ground that it is leading and suggestive.

The COURT.—Overruled. [508]

Mr. SMITH.—I submit, may it please the Court, that Mr. Gillis says he understands. Let us have what the witness understands.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. That was my understanding. That is the reason I did it in that manner.

The COURT.—Were you directed to make up the account in that way? A. Yes.

Mr. GILLIS.—Q. Mr. Vaughan, will you look at the bottom of page 69, an item there mentioned, "New Police $90"; that is in your handwriting, is it? A. Yes.

Mr. SMITH.—What is the item referred to?

Mr. GILLIS.—"New Police, $90."

Mr. SMITH.—I cannot agree with you that that is what it says there. It looks to me like "New Policy."

Mr. GILLIS.—Q. Did someone give you instructions with reference to putting that in there, Mr. Vaughan?

A. They must have, otherwise I would not have written it, not knowing anything about any payment of any kind.

Q. Do you know who gave you those instructions?

A. Well, I can say Mr. Birdsall, although I do not recall the incident just now.

Q. That is the best of your recollection?

A. Yes.

The COURT.—Is it "New Police," or "New Policy"? A. It looks like "Policy" here.

Q. Do you remember?

A. I do not recall the item, no.

Mr. GILLIS.—Q. Do you recall the incident at all?

A. No, nothing about it, nothing in my mind now on it, it is my writing, but I do not recall writing it there, that is, any [509] special incident connected with it.

Q. You have no recollection as to what that particular item is?

Mr. O'CONNOR.—Objected to on the ground it has been asked and answered.

The COURT.—I will let him answer again. You may answer.

Mr. O'CONNOR.—Exception.

A. No, I do not recall.

Mr. GILLIS.—Q. Now, do you remember, Mr. Vaughan, about the first time that you went into that place, 1249 Polk Street?

A. Do I remember about the first time?

Q. About the first time you went in there.

A. From the books, the only recollection I have here, I see my figures at the end of February.

Q. Before you took up the matter of keeping the books with Mr. Birdsall, had you gone into that place?

Mr. SMITH.—That is objectionable on the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

A. I do not recall now whether I had or not.

to which ruling of the Court said defendants then and there duly and regularly excepted.

XXV.

The Court erred in admitting in evidence over the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 15, testified to by witness Coleman, entitled "a receipt of the Water Company stamped by perforated stamps—September 5th, 1924, under the name of Eddie Marron," taken from the Water Company:

Mr. SMITH.—We will object to its introduction on the ground it is immaterial, irrelevant and incompetent and no [510] proper foundation has been laid for its introduction.

The COURT.—Overruled.

Mr. SMITH.—Exception.

to which exception defendants then and there duly and regularly excepted.

XXVI.

The Court erred in admitting in evidence over

the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 18, and entitled, Affidavit of Candidate, Eddie *Matton:*

Mr. SMITH.—We will object it is immaterial, irrelevant and incompetent and no foundation laid.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

to which said ruling the defendants duly and regularly excepted.

XXVII.

The Court erred in admitting in evidence over the objection of the defendants the following statement or document to wit: U. S. Exhibit No. 19, being a statement of telephone charges effective November 21, 1923, to October 20, 1924, and the service application.

Mr. SMITH.—I object on the ground that it is immaterial, irrelevant and incompetent and no foundation laid for its introduction.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

to which ruling defendants duly and regularly excepted.

XXVIII.

The Court erred in admitting in evidence over the objection of the defendants U. S. Exhibit No. 14 for Identification, being [511] a statement or document showing telephone bill, Ed Marron, 1249 Polk Street:

Mr. SMITH.—Objected to on the ground it is immaterial, irrelevant and incompetent and no proper foundation has been laid.

The COURT.—Overruled.

Mr. SMITH.—Exception.

to which ruling defendants duly and regularly excepted.

Mr. GILLIS.—Q. What is it?

A. A telephone bill payment.

Q. One of the regular telephone company bills?

A. Not exactly, no; it is a duplicate issued in case the original was lost.

Q. What I mean by that is, that it is a bill from the telephone company? A. It is.

Q. It is one of the telephone company's regular instruments that they send out? A. Yes.

to which ruling defendants duly and regularly excepted.

XXIX.

The Court erred in admitting into evidence over the objection of the defendants the following statement or document, to wit: United States Exhibit No. 21, being a statement of account of the Bank of Italy. The full substance of the evidence thus admitted is set out in the following extract from the testimony of the witness Bell under direct examination by counsel for the plaintiff:

Mr. SMITH.—To which we object on the ground it is immaterial, irrelevant, incompetent, no foundation has been laid for its introduction; furthermore, that the introduction

of that instrument violates the constitutional guarantees of the defendant Marron, in that defendant is compelled to be the unlawful source of information against himself.

The COURT.—Overruled.

Mr. SMITH.—Note an exception. [512]

Mr. GILLIS.—Q. Can you tell from that record, Mr. Bell, the length of time that that joint account was kept at your bank? A. Yes.

Q. Will you state what that is?

A. The account was opened on September 4, 1923, and was closed on November 14th of the same year.

Q. November when? A. November 14th.

Q. Is there anything on there to indicate at all who could draw money out of the bank, or how many signatures were needed to draw money out of the bank?

Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, not the best evidence, that the instrument will speak for itself.

Mr. GILLIS.—Withdraw the question.

Q. Calling your attention, Mr. Bell, to the heavy typing at the top of the page "Two signatures required," what does that signify?

Mr. SMITH.—To which we will object on the ground that it is immaterial irrelevant and incompetent, and no bearing upon the issues in this case.

The COURT.—

Mr. SMITH.—Exception.

A. Those are the instructions to the bookkeeper that both signatures are required to draw against the account.

Mr. GILLIS.—Q. By that do you mean the signature of Marron and—

A. (Intg.) Brand.

Q. Brand? A. Yes.

Mr. GILLIS.—No further questions.

Mr. SMITH.—No questions. Now, I will ask that the entire testimony be stricken from the record on the ground that it is immaterial, irrelevant and incompetent. [513]

The COURT.—Motion denied.

Mr. SMITH.—That the testimony does not show that the defendants, any of the defendants in this action are in any way connected with this account.

The COURT.—Motion denied.

Mr. SMITH.—Note an exception.

to which defendant duly and regularly excepted.

XXX.

The Court erred in admitting in evidence over the objection of the defendants the testimony of witness Hicks; the full substance thus admitted is set out in the following extract from the testimony of witness Hicks under the direct examination by counsel for plaintiff:

XXXIX.

The Court erred in admitting into evidence, over the objection of the defendants, the following statement given by the witness Kissane, under cross-examination:

Mr. GILLIS.—Q. When you talked to Birdsall and he said that he lived there, did you believe that he lived there then?

Mr. SMITH.—That is calling for the conclusion and opinion of the witness, and is objected to on that ground.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. I really did not know whether he was living there or not.

Mr. GILLIS.—Q. What did you believe about it?

Mr. SMITH.—That is objected to on the same grounds.

Mr. GILLIS.—Q. What did you think about it?

The COURT.—Same ruling.

Mr. SMITH.—Exception. [514]

A. I don't know what I did think about it. To tell you the truth about it, I think I thought that he was not living there.

Mr. SMITH.—He thought he was not living there, I ask that that go out.

Mr. GILLIS.—Q. You thought that he was not?

A. I thought he was not. I didn't know that he was there or not, because I was never there at night-time.

Q. Did you believe him when he said he lived there?

A. I don't know whether I did or not; I would not say.

Q. When he said that he lived there, did you believe what he said?

A. No, I don't think I did believe him.

to which ruling the defendants then and there duly and regularly excepted.

XL.

The Court erred in admitting into evidence over the objection of the defendants the following statement given by the witness Kissane as follows:

Q. Now, did you draw any conclusion, or had you drawn any conclusion at that time, as to what kind of a business was being conducted there?

Mr. SMITH.—That is objected to on the very ground indicated by the question itself.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. Of course, it was a suspected place of bootlegging, and that is the reason I was visiting it.

Mr. GILLIS.—Q. Suspected of bootlegging, but did you draw any conclusion as to what kind of business they were conducting there, if any?

Mr. SMITH.—The same objection. [515]

Mr. GILLIS.—Q. Was it your conclusion that it was a bootlegging business there, or that it was a soft-drink parlor, or something of that nature?

A. I thought they were bootlegging, that was all there was to it.

to which ruling the said defendants then and there duly and regularly excepted.

XLI.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Kissane:

Q. Now, when you went in there and saw Birdsall in there for the first time, you knew that Birdsall had been a bartender, did you not?

Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, and there is nothing in this record to show that Mr. Birdsall was a bartender, and not involved in the issues, whether he was a bartender or not; and I ask that the question be stricken from the record.

The COURT.—The motion is denied and overruled.

Mr. SMITH.—Note an exception.

A. Yes, I did.

Mr. GILLIS.—Q. You knew that was his principal business, didn't you? A. Yes.

Q. And had been for a great many years?

Mr. SMITH.—I will object to that on the ground that it is immaterial, irrelevant and incompetent, and has no bearing on the issues of this case what he had been doing for a number of years; we are only concerned with what happened from May, 1923, the period covered by this indictment.

Mr. GILLIS.—I am asking if he had that knowledge of this man [516] at that time.

The COURT.—Overruled.

Mr. SMITH.—Exception. A. Yes.

Mr. GILLIS.—Q. And that was one of the things that led you to suspect the place as a bootlegging place when you saw him in there, was it not?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. Well, I suspected it as a bootlegging place before ever Birdsall came there.

to which ruling the defendants then and there duly and regularly excepted.

XLII.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Gorham during cross-examination:

Q. When you saw Birdsall there—by the way, you have known Birdsall for some time?

A. I have known him for over 20 years.

Q. When you saw him at the head of the stairs, you knew at that time that Birdsall had been a bartender for a great many years, did you not?

Mr. SMITH.—That is objected to on the ground it is immaterial irrelevant and incompetent, and has no bearing on the issues in this case.

The COURT.—Overruled.

A. I had always known Birdsall, either as bartender or saloon man, except there was one time he worked for the gasoline station up on Divisadero Street.

to which ruling the defendants then and there duly and regularly excepted. [517]

XLIII.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Latham:

Mr. GILLIS.—You have already been sworn in this case, Mr. *Lathen*. Mr. Lathem, did you visit 1249 Polk Street, the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what?

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249 Polk, so there is nothing to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

Q. Do you remember about when that was, approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it. [518]

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections, and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir.

Q. That would be the side nearer the Judge's bench? A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at [519] that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out.

A. I poured out some, myself.

Q. What was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose of getting a drink, and I went out.

to which ruling the defendants then and there duly and regularly excepted. [520]

XLIV.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Latham:

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there at that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

to which ruling the defendants then and there regularly and duly excepted.

XLV.

The Court erred in denying the motion of the attorneys for the defendants for a directed verdict at the conclusion of all the evidence, to which ruling of the Court the defendants then and there duly and regularly excepted.

XLVI.

The Court erred in charging the jury as follows:

Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one *of* Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that [521] one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to

determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you that these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy.

to which ruling the defendants then and there duly and regularly excepted.

XLVII.

The Court erred in charging the jury as follows:

Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1,000 to Mr. Brand, without knowledge of the purpose for which it was to be used, and that after Mr. Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of

a business in violation of the National Prohibition Act, [522] then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

Likewise, if you should find from the evidence that even if the original loan was without knowledge of understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand, by Mr. Marron, after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy.

to which ruling the defendants then and there duly and regularly excepted.

XLVIII.

The Court erred in refusing to give to the jury Instruction No. I, which is as follows:

INSTRUCTION No. I.

Gentlemen of the Jury, I charge you that as

to the defendant George L. Birdsall, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit said defendant George L. Birdsall.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. III, which instruction is as follows: [523]

INSTRUCTION No. III.

Gentlemen of the Jury, I charge you that as to the defendant Joseph E. Marron, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant Joseph E. Marron.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XII, which instruction is as follows:

INSTRUCTION No. XII.

Mere probabilities, much less possibilities, conjectures and suspicions, are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the testimony supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that a defendant is guilty.

to which refusal to give such instruction the de-

fendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVI, which instruction is as follows:

INSTRUCTION No. XVI.

> The defendants are and each of them is, clothed with the presumption of good character and this presumption of good character is a right to which they are, and each of them is, entitled, and of which they, or any of them, cannot be deprived under the law until guilty intent is established to a moral certainty and beyond all reasonable doubt.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVII, which instruction is as follows:

INSTRUCTION No. XVII.

> The defendants in this case are entitled to the independent judgment of each and every juror who has been selected to try them. It is one of the fundamental principles of this government, a principal that has been adopted for the protection of the people that twelve men shall constitute a jury and that no man may be convicted of any offense unless the judgment of each and all of such twelve men shall concur in the conviction that to a [524] moral certainty and beyond every reasonable doubt

the defendant is guilty of the offense charged against him. If, therefore, any one or any number of you, after carefully deliberating upon the evidence in this case, under the instructions of the Court, shall be of the opinion that the defendants have not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those jurors entertaining such opinion should vote in favor of acquittal and should adhere to that opinion until convinced beyond a reasonable doubt that such opinion is wrong, and they should not be convinced by the mere fact that the majority of the jury differ from them in opinion.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVIII, which instruction is as follows:

INSTRUCTION No. XVIII.

One individual alone cannot be guilty of a conspiracy. The conspiracy must be proven to a moral certainty and beyond a reasonable doubt, against two or more of the alleged conspirators, to justify a verdict of guilty. If, therefore, the evidence does not show, to a moral certainty and beyond a reasonable doubt, that any two or more of the defendants did enter into the conspiracy alleged in the felony indictment, your verdict must be not guilty as to all of the defendants.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXIII, which instruction is as follows:

INSTRUCTION No. XXIII.

I instruct you, gentlemen, that expert witnesses are generally but ready advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed, and, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable. Such evidence should be received with great caution by the jury. (Gribsby vs. Clear Lake Water Co., 40 Cal. 405.)

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXIV, which instruction is as follows: [525]

INSTRUCTION No. XXIV.

The testimony of experts is by no means conclusive and when offered, cannot prevent the jury from comparing the documents with a view to question their similarity and it may wholly disregard their testimony and exercise its own judgment. (Castor vs. Bernstein, 2 Cal. App. 704.)

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXVI, which instruction is as follows:

INSTRUCTION No. XXVI.

> I charge you that before you can find the defendant George L. Birdsall guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXVII, which instruction is as follows:

INSTRUCTION No. XXVII.

> I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXX, which instruction is as follows:

INSTRUCTION No. XXX.

> I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant conviction. Therefore, if you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise, if you find that Joseph E. Marron took any part in this alleged conspiracy but did not [526] have knowledge of its existence, you must find him not guilty.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXXVI, which instruction is as follows:

INSTRUCTION No. XXXI.

> I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore, if you find that the defendant George L. Birdsall knew that this

conspiracy was in being but did not participate therein you must find him not guilty. Likewise, if you find that George L. Birdsall took any part in this alleged conspiracy but did not have knowledge of its existence, you must find him not guilty.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXXVI, which instruction is as follows:

INSTRUCTION No. XXXVI.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant or defendants on trial in the case in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to convict the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient if it [527] merely shows the commission of the offense or the circumstances thereof.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

XLIX.

The Court erred in using its judicial discretion

in denying the motion of the defendants, and each of them, for a new trial, and in this connection in refusing to hold and decide as next hereinafter set forth:

1. That the verdict is contrary to the evidence.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing defendants Joseph E. Marron and George Birdsall special instructions, Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 30, 31 and 36.

5. That the Court erred in so much of its general charge as it left to the jury to determine whether or not the defendants here, or either, or any of them, were the parties to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendants.

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendants. [528]

10. Errors of law occurring at the trial and excepted to by the defendants.

11. Further, on the ground of newly discovered evidence.

to which denial and refusal the defendants then and there duly and regularly excepted.

L.

The Court erred in refusing the motion of the defendants in arrest of judgment, in the following particulars:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendants with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been committed against the United States.

4. That evidence against these defendants has been received on matters pertaining to former jeopardy, which said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient in law to support a conviction.

7. That these defendants have been convicted without due process of law, and in violation of Articles IV, V and VI of Amendments to the Constitution of the United States.

to which refusal the defendants then and there duly [529] and regularly excepted.

LI.

The Court erred in imposing sentence and judgment upon the defendant Joseph E. Marron in the penitentiary for two years, and that he be fined the sum of ten thousand dollars, to which the defendant Joseph E. Marron then and there duly and regularly excepted.

LII.

The Court erred in imposing sentence and judgment upon the defendant George Birdsall in the penitentiary for thirteen months, and that he be fined in the sum of two thousand dollars, to which the defendant George Birdsall then and there duly and regularly excepted.

LIII.

That the judgment and sentence as to the defendant Joseph E. Marron is wholly inconsistent by any evidence showing or tending to show that the said defendant Joseph E. Marron combined, confederated, conspired or agreed with any other defendants in the said indictment named, or with any other persons, or at all, in the city and county of San Francisco and within the jurisdiction of the above-entitled court, or otherwise, or at all, to violate the act of Congress of October 28, 1919, to wit, National Prohibition Act, or in violation of

any law of the United States, and to which the defendant Joseph E. Marron then and there duly and regularly excepted.

LIV.

That the judgment and sentence as to the defendant George Birdsall is wholly inconsistent by any evidence showing or tending to show that the said defendant George Birdsall combined, confederated, conspired or agreed with any other defendants in the said indictment named, or with any other persons, or at all, in the city and [530] county of San Francisco and within the jurisdiction of the above-entitled court, or otherwise, or at all, to violate the act of Congress of October 28, 1919, to wit, National Prohibition Act, or in violation of any law of the United States, and to which the defendant George Birdsall then and there duly and regularly excepted.

LV.

That the introduction in evidence of all the papers, records, files, and particularly United States Exhibit No. 3, over the objection of the defendants Joseph E. Marron and George Birdsall, was and is in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and was in contravention of their constitutional rights guaranteed them under the said Constitution of the United States, to which the defendants then and there duly and regularly excepted.

LVI.

That the articles used at the premises 1249 Polk Street were without color or without right, in that

the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced in evidence as Government's Exhibit No. 1, and to which the defendants then and there duly and regularly excepted.

LVII.

That the articles used at the premises 1249 Polk Street were without color or without right, in that the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced in evidence as Government's Exhibit No. ——, and to which the defendants then and there duly and regularly excepted. [531]

WHEREAS, by the law of the land said judgment ought to be given for Joseph E. Marron and George Birdsall, plaintiffs in error, and against the United States of America, defendant in error, said plaintiffs in error, Joseph E. Marron and George Birdsall, do now pray the judgment herein rendered against them, and each of them, to be reversed and annulled, and altogether held for nothing, and the sentence herein imposed upon them, and each of them, respectively to be set aside and held for naught, and that they, and each of them, be restored to all things which they have lost by occasion of the said judgment, and that they be afforded such and any and all relief as may be meet in the premises.

Dated: San Francisco, California, January 20, 1925.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Said Defendants Joseph E. Marron and George Birdsall.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [532]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GEORGE HAWKINS et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR, STAYING SENTENCE AND EXECUTION, etc. (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come Joseph E. Marron and George Birdsall, defendants herein, and file herein and present to the Court their petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to have the above-entitled court and submit herewith the assignment of errors intended to be urged by them;

praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and praying also that meanwhile all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and each of the above-named defendants having heretofore submitted to the above-entitled court his respective bond for appearance in the United States District Court for the Northern District of California, or in the United [533] States Circuit Court of Appeals for the Ninth Circuit, or in the Supreme Court of the United States of America, as may hereafter in this case be ordered, in the sums following, to wit: defendant Joseph E. Marron in the sum of Ten ($10,000.00) Thousand Dollars; defendant George Birdsall in the sum of Five ($5,000.00) Thousand Dollars, said sums being the amount of bail heretofore fixed by this Court for each of said defendants, respectively, and said bonds, and each of them, having been heretofore accepted and approved by this Court;

IT IS HEREBY ORDERED that the aforesaid writ of error be and the same is hereby allowed;

AND IT IS FURTHER ORDERED that a transcript of the record, proceedings and papers in this

cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit;

AND IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit;

AND IT IS FURTHER ORDERED that the bond for costs upon the writ of error herein, be and it is hereby fixed at the sum of $250.00 dollars.

Dated: January 20, 1925.

JOHN S. PARTRIDGE,
Judge of the United States District Court for the Northern District of California.

Receipt of a copy of the within order is hereby admitted this 20 day of January, 1925.

STERLING CARR.
By THOS. J. RIORDAN.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [534]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GEORGE HAWKINS et al.,
Defendants.

SUPERSEDEAS BOND (JOSEPH E. MARRON).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph E. Marron, of the City and County of San Francisco, as principal, and Aloysius I. O'Brien and Genevieve M. O'Brien and Aladino Pisani and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the sum of Ten Thousand 00/100 Dollars, lawful money of the United States of America, and the further sum of Two Hundred Fifty 00/100 Dollars, lawful money of the United States of America, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this 20th day of January, 1925.

WHEREAS, lately at a term of the Southern Division of the United States District Court, for the Northern *Division* of California, in a suit pending in said court between the United States of America and George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, Joseph Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gorham, defendants, a judgment and sentence was made, given, rendered, and entered against the said defendants [535] Joseph E. Marron, George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, and

said defendants having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit of the State of California, pursuant to the terms, and at the time fixed in said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Joseph E. Marron shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for hearing of said cause in said court and prosecute his writ of error, and if the said Joseph E. Marron shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by said court, provided the judgment and sentence against him shall have been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above

obligation is to be void; otherwise to remain in full force. [536]

EDDIE MARRON,
Principal.
ALADINO PISANI,
THERESA PISANI,
Sureties.

ALOYSIUS I. O'BRIEN.
GENEVIEVE O'BRIEN.

Signed, sealed, and acknowledged before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, Northern District of California, at San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Aloysius I. O'Brien and Genevieve O'Brien and Aladino Pisani and Theresa Pisani, being duly sworn, each for himself says: That he is a resident and householder in said Northern District of California, and is worth in property situate therein *is* the sum of Ten Thousand Two Hundred Fifty Dollars, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

ALOYSIUS I. O'BRIEN.
GENEVIEVE O'BRIEN.
ALADINO PISANI.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, Northern District of California, at San Francisco. [537]

United States of America,
Northern District of California,—ss.

Genevieve O'Brien, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2158 Bush Street, in the city of San Francisco, State of California, and by occupation, housewife.

That I am worth the sum of Ten Thousand Two Hundred Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of business property, 2014 to 2022 Fillmore St.

Two flats—2156–8 Bush St., San Francisco, Cal., $36,000.00. My interest in above property, less encumbrances, is $13,000 net.

That the encumbrances on the foregoing property are as follows:

Mortgage on Fillmore property, $6,000.00.

That my total assets, above all liabilities and obligations on other bonds, is the sum of $15,000.

That I am not surety upon outstanding penal bonds now in force, aggregating total penalty $——.

GENEVIEVE O'BRIEN. (Seal)
ALOYSIUS I. O'BRIEN.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [538]

United States of America,
Northern District of California,—ss.

Aladino Pisani and Theresa Pisani, whose names are subscribed to the foregoing undertaking as one of the sureties, thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2463 Sacto. Street, in the City of San Francisco, State of California, and by occupation housewife.

That I am worth the sum of Ten Thousand Two Hundred Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of 2457 to 2467 Sacto. St., S. F. Cal., being six flats, value $24,000.

⅓ interest in flats, 2156–8 Bush St., San Francisco, value $3,000.

That the encumbrances on the foregoing property are as follows:

Mtge. on Sacto. St. property of $8,000.

That my total net assets, above all liabilities and obligations on other bond, is the sum of $19,000.

That we are not surety upon outstanding penal bonds now in force, aggregating total penalty, $——.

THERESA PISANI. (Seal)
ALADINO PISANI.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [539]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

SUPERSEDEAS BOND (GEORGE BIRDSALL).

KNOW ALL MEN BY THESE PRESENTS, that we, George Birdsall, of the City and County of San Francisco, as principal, and Hugh L. Smith,

as depositor of Liberty bonds as bail, as surety, are held and firmly bound unto the United States of America in the sum Five Thousand 00/100 dollars, lawful money of the United States of America, and the further sum of Two Hundred Fifty Dollars, lawful money of the United States of America, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, 1925.

WHEREAS, lately at a term of the Southern Division of the United States District Court, for the Northern Division of California, in a suit pending in said court between the United States of America and George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, Joseph Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gorham, defendants, a judgment and sentence was made, given, rendered, and entered against the said defendants [540] Joseph E. Marron, George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, and said defendants having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit of the State of California, pursuant to the terms, and at

the time fixed in said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said George Birdsall shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for hearing of said cause in said court and prosecute his writ of error, and if the said George Birdsall shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by said Court, provided the judgment and sentence against him shall have been reversed by the United States Circuit Court of Appeals, for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force. [541]

And whereas, under the provisions of section 1320a of the United States Revenue Act, approved February 24, 1919, the undersigned has deposited with Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, the official having authority to take and to approve this penal bond, in lieu of surety or sure-

ties, certain United States Liberty bonds as follows, viz.

# 976631 Due 1947 coupons 15 to 60 incl. face value		$1000
1250469	Same	1000
1250470	Same	1000
1313254	Same	1000
1313259	Same	1000
		$5000

And whereas, the above-described United States Liberty bonds are deposited upon the condition and agreement herein given and made that said United States Commissioner shall be and he is hereby authorized and empowered to collect or to sell the above-described bonds so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. Such power to sell or to collect such bonds shall extend to his successor in office.

Attached to and made a part of penal bond executed in behalf of George Birdsall in criminal case No. 15708.

[Seal] (Commissioner's) HUGH L. SMITH.

[542]

GEORGE BIRDSALL,
Principal.

HUGH L. SMITH,
Sureties.

Signed, sealed, and acknowledged before me this 20th day of January, 1925.

FRANCIS KRULL,
United States Commissioner, Northern District of California at San Francisco.

[Endorsed]: Approved as to form only.

KENNETH C. GILLIS,
Asst. U. S. Atty.

Filed Feb. 14, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [543]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendant.

SUPERSEDEAS BOND (JOSEPH GORHAM).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph Gorham, of the City and County of San Francisco, State of California, as principal, and John Linehan and Charles F. Kane, both of the City and County of San Francisco, State of California, as sureties, are firmly bound and held unto the United States of America in the full sum of

Five Thousand Dollars, 5000.00/100, lawful money of the United States, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our hands and dated this 20th day of January, 1925.

WHEREAS, at the time of the Southern Division of the United States District Court for the Northern District of California, First Division, in the suit pending in the said court between the United States of America and Joseph Gorham et al., No. 15,708, on the records of said court, a judgment and sentence was made, given, rendered and entered against said defendant Joseph Gorham in said suit No. 15,708 as aforesaid, and the said Joseph Gorham having obtained a writ [544] of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence made and entered in said suit and the citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals of the Ninth Circuit at San Francisco pursuant to the terms and at the time fixed in said citation.

Now, the condition of the above obligation is such that if the said Joseph Gorham shall appear, either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth District on such day or days as may be appointed for the hearing of said cause in said court and prosecute said

writ of error, and if the said Joseph Gorham shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence shall be affirmed, or the said writ of error dismissed; and if he shall appear for trial in the District Court of the United States of America for the Northern District of California on such day or days as may be appointed for retrial of said District Court and abide by and obey all orders made by said court, provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth District, then the above obligation to be void; otherwise, to remain in full force, virtue and effect. [545]

JOSEPH GORHAM.
JOHN F. LINEHAN.
CHAS. F. KANE.

Signed, sealed and acknowledged before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner for the Northern District of California at San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John Linehan and Charles F. Kane, being first duly sworn, each for himself, says:

First, that he is a resident and freeholder in the State and Northern District of California, and is worth in property situated therein, the sum of Five Thousand—$5000.00—Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN F. LINEHAN.
CHAS. F. KANE.

Subscribed and sworn to before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California at San Francisco. [546]

United States of America,
Northern District of California,—ss.

Charles F. Kane, whose name is subscribed to the foregoing undertaking as one of the sureties, thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 642–15th Ave., in the City of San Francisco, State of California, and by occupation drayman.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real Estate consisting of: House and Lot 642

15th St., S. F., val. $1200; Howard near 14th 30x120, val. $4000; Lot (debt on?) $1000.

That the encumbrances on the foregoing property are as follows: none.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $50,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

CHAS. F. KANE. (Seal)

Subscribed and sworn to before me this 20 day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [547]

United States of America,
Northern District of California,—ss.

John F. Linehan, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 1560 Sacramento Street, in the City of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of:

3 story on 19th South side, 3 flats, val.	$15,000
2 Flats 2184–86 Howard St., val.	11,000
N. W. Cor. France Ave. & Vienna St., S. F. val.	1,000
S. W. Cor. France Ave. & Athens St., S. F. val.	1,250
	$26,250

That the encumbrances on the foregoing property are as follows: Mtge. $7500.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $50,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

JOHN F. LINEHAN.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [548]

[Endorsed]: Form of bond approved.
KENNETH C. GILLIS,
Assistant United States Attorney.

Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [549]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

BOND OF PATRICK KISSANE TO APPEAR ON WRIT OF ERROR.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we, Patrick Kissane, as principal, and Catherine Smith and Anna Smith, as sureties, are held and firmly bound unto the United States of America in the sum of Five Thousand ($5000.00) Dollars, to be paid to the said United States of America, for payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our hands and seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

THE CONDITIONS of the above recognizance is such, that whereas, an indictment has been returned by the United States Grand Jury, and an

indictment filed against said Patrick Kissane on the 17th day of October, A. D. 1924, in the Southern Division of the United States District Court for the Northern District of California, First Division, [550] charging the said Patrick Kissane and others in said indictment named and referred to, with entering into a conspiracy, combination, confederation and agreement, on or about the 1st day of May, 1923, in the Southern Division of the Northern Division of the Northern District of California, and within the jurisdiction of the above-entitled court, to violate the provisions of the National Prohibition Act and the regulations of the Commissioner of Internal Revenue and modifications thereof, in violation of the Act of Congress approved October 28, 1919, and known as the National Prohibition Act; thereafter judgment and sentence was made, rendered and entered, and the said Patrick Kissane having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgments and sentences made and entered in said suits, and citation directed to the United States of America to be and appear in the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which said citation has been duly served.

Now, the condition of the above obligation is such, that if the said Patrick Kissane shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hear-

ing of said cause in said court and prosecute said writ of error, and if the said Patrick Kissane shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said causes and shall surrender himself in execution of said judgments and sentences against him shall be affirmed or the said writ of error dismissed. And if he shall appear for trial in a District Court of the United States for the Northern District [551] of California, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court, provided the judgments and sentences against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

PATRICK KISSANE. (Seal)

Address: 130 Twenty-first Avenue, San Francisco, California.

CATHERINE SMITH. (Seal).

Address: 2621 Lake Street, San Francisco, California.

ANNA SMITH.

2621 Lake Street, San Francisco, California. [552]

United States of America,
Southern Division of the Northern District of California,
City and County of San Francisco.—ss.

Catherine Smith, one of the sureties whose names are subscribed to the foregoing undertaking, being first duly sworn, deposes and says: I do swear that

I am worth in my own right the sum of Twelve Thousand ($12,000.00) Dollars, after deducting from my property all that is exempt by the Constitution and laws of the State of California from forced sale, and after payment of all of my debts of every description, whether individual or security debts, and after satisfying all encumbrances upon my property which are known to me; I am not a surety on any other bond, recognizance or undertaking; that I reside in the City and County of San Francisco, State of California, and have property in this State, liable to execution, worth more than the sum of Twelve Thousand ($12,000.00) Dollars.

CATHERINE SMITH.

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,

United States Commissioner for the Northern District of California, at San Francisco. [553]

United States of America,

Southern Division of the Northern District of California,

City and County of San Francisco,—ss.

Anna Smith, one of the sureties whose names are subscribed to the foregoing undertaking, being first duly sworn, deposes and says: I do swear that I am worth in my own right the sum of Five Thousand Dollars after deducting from my property all that is exempt by the Constitution and laws of the State of California from forced sale, and after payment

of all of my debts of every description, whether individual or security debts, and after satisfying all encumbrances upon my property which are known to me; I am not a surety on any other bond, recognizance or undertaking; that I reside in the City and County of San Francisco, State of California, and have property in this State, liable to execution, worth more than the sum of Twelve Thousand ($12,000.00) Dollars.

ANNA SMITH.

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California, at San Francisco. [554]

United States of America,
Northern District of California,—ss.

Catherine Smith, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2621 Lake Street, in the city of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of
4 Apts.—2617, 2619, 2621, 2623 Lake St.
Val. $30,000
Lot 17th near Hattie, S. F., Val. 2,500

That the encumbrances on the foregoing property are as follows: Mtge. $5,500—Private.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $12,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

CATHERINE SMITH. (Seal)

Subscribed and sworn to before me this 20' day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California. [555]

United States of America,
Northern District of California,—ss.

Anna Smith, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2621 Lake Street, in the City of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand ($5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now

standing of record in my name, consists in part as follows:

Real Estate, consisting of as above ½ interest in described properties.

That my total net assets, above all liabilities and obligations on other bond, is the sum of $12,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

ANNA SMITH. (Seal)

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [556]

[Endorsed]: Approved as to form.

STERLING CARR,
U. S. Attorney.
By T. J. SHERIDAN,
Deputy.

Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [557]

BOND FOR COSTS (PATRICK KISSANE).

KNOW ALL MEN BY THESE PRESENTS, that we, Patrick Kissane, as principal, and Catherine Smith and Anna Smith, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said United States of America —— certain attorney, executors, admin-

istrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the United States of America, plaintiff, and Patrick Kissane et al., defendants, #15,-708—Criminal, a judgment of conviction and sentence was rendered against the said Patrick Kissane, and the said Patrick Kissane having obtained from said Court a writ of error to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH: That if the said Patrick Kissane shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [558]

PATRICK KISSANE. (Seal)
CATHERINE SMITH. Seal)
ANNA SMITH. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner, Northern District of California at S. F.

United States of America,
Northern District of California,—ss.

Catherine Smith, Anna Smith, being duly sworn, each for *himself*, deposes and says, that *he* is a freeholder in said District, and is worth *to* sum of Five Hundred ($500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

CATHERINE SMITH.
ANNA SMITH.

Subscribed and sworn to before me this 20th day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [559]

BOND FOR COSTS (JOSEPH GORHAM).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph Gorham, as principal, and John Linehan and Charles F. Kane, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred and

Fifty ($250.00/100) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the United States of America, plaintiff, and Joseph Gorham, defendant, number 15708, a judgment and sentence was rendered against the said Joseph Gorham and the said defendant, Joseph Gorham, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Joseph Gorham shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [560]

JOHN LINEHAN. (Seal)
JOSEPH GORHAM. (Seal)
CHAS. F. KANE. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner, Northern District of California at S. F.

United States of America,
Northern District of California,—ss.

John Linehan and Charles F. Kane, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth *to* sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOHN LINEHAN.
CHARLES F. KANE.

Subscribed and sworn to before me this 20th day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [561]

BOND FOR COSTS (JOSEPH E. MARRON).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph E. Marron and Genevieve O'Brien and Theresa Pisani as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty 00/100

dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court between the United States of America, plaintiff, and Joseph E. Marron, defendant, number 15708, a judgment and sentence was rendered against the said Joseph E. Marron, and the said defendant Joseph Marron having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Joseph E. Marron shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [562]

EDDIE MARRON. (Seal)
GENEVIEVE O'BRIEN. (Seal)
THERESA PISANI. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

United States of America,
Northern District of California,—ss.

Genevieve O'Brien and Theresa Pisani, being duly sworn, each for himself deposes and says that he is a freeholder in said District, and is worth *to* sum of Two Hundred Fifty Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GENEVIEVE O'BRIEN.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of Jany., A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [563]

BOND FOR COSTS (GEORGE BIRDSALL).

KNOW ALL MEN BY THESE PRESENTS, that we, George Birdsall, as principal, and Genevieve O'Brien and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty 00/100 Dollars, to be paid to the said

United States of America—certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court between the United States of America, plaintiff, and George Birdsall, defendant, number 15,708, a judgment and sentence was rendered against the said George Birdsall, and the said defendant George Birdsall having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said George Birdsall shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue. [564]

GEORGE BIRDSALL. (Seal)
GENEVIEVE O'BRIEN, (Seal)
2158 Bush St., S. F., Cal.,
THERESA PISANI, (Seal)
2463 Sacto. St., S. F., Cal.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California, at S. F.

United States of America,
Northern District of California,—ss.

Genevieve O'Brien and Theresa Pisani, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth *to* sum of Two Hundred Fifty 00/100 Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GENEVIEVE O'BRIEN.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of Jany., A. D. 1925.

[Seal] FRANCIS KRULL,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Feb. 14, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [565]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

ORDER THAT ONE ENGROSSED BILL OF EXCEPTIONS MAY BE USED ON APPEAL ON EACH SEPARATE WRIT OF ERROR.

IT IS HEREBY ORDERED, in accordance with the stipulation of counsel for the respective parties entered into, and part of the engrossed bill of exceptions on file herein, that one engrossed bill of exceptions may be used on appeal on the separate writs of errors sued out by Joseph E. Marron, George Birdsall, Patrick Kissane and Joseph Gorham.

Dated: February 5th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [566]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS.

In accordance with the stipulation entered into between counsel for both parties, and incorporated in the engrossed bill of exceptions herein, it is hereby,

ORDERED, that all the exhibits introduced in the above-entitled action in their original form be marked by the Clerk and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated: February 5th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [567]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 567 pages, numbered from 1 to 567, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Joseph E. Marron et al., No. 15,708, as the same now reman on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on writs of error (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writs of error is the sum of Two Hundred Forty Dollars and Seventy Cents ($240.70), and that the same has been paid to me by the attorneys for the plaintiffs in error herein.

Annexed hereto are the original writs of error (three), returns to writs of error, and original citations on writs of error (three).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of March, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [568]

WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph E. Marron and George Birdsall, defendants in error, a manifest error hath happened, to the great damage of the said Joseph E. Marron and George Birdsall, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be

done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge.

Receipt of a copy of the within writ of error admitted this 20th day of Jan., 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. Southern Division of the United States District Court for the Northern District of California, First Division. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [569]

RETURN TO WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [570]

CITATION ON WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Joseph E. Marron and George Birdsall are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of a copy of the within citation on writ of error admitted this 20th day of Jan., 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. Southern Division of the United States District Court for the Southern District of California, First Division. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [571]

WRIT OF ERROR (JOSEPH GORHAM).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph Gorham, defendant in error, a manifest error hath happened, to the great damage of the said Joseph Gorham, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: No. 15,708. United States District Court for the Nor. District of Cal. U. S. Plaintiff, vs. Gorham, Defendant. Writ of Error.

Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [572]

RETURN TO WRIT OF ERROR (JOSEPH GORHAM).

The answer of the Judges of the United States District Court for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [573]

CITATION ON WRIT OF ERROR (JOSEPH GORHAM).

United States of America,—ss.

The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Joseph Gorham, —— plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of copy of within citation on writ of error admitted this 20th day of January, 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. United States District Court for the Nor. District of Cal. U. S. A., Plaintiff, vs. Gorham, Defendant. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [574]

WRIT OF ERROR (PATRICK KISSANE).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Southern Division of the Northern District of California, First Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Patrick Kissane, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Patrick Kissane, plaintiff in error, as by complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have

the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk, U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge. [575]

Due service of the within writ of error is hereby admitted, this 20th day of January, 1925.

STERLING CARR,
Attorney for U. S. of America.

[Endorsed]: No. 15,708—Cr. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. Patrick Kissane et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan. 20, 1925.

Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [576]

RETURN TO WRIT OF ERROR (PATRICK KISSANE).

The answer of the Judges of the United States District Court for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [577]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

Number 15,708—CR.

PATRICK KISSANE et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

CITATION ON WRIT OF ERROR (PATRICK KISSANE).

United States of America—ss.

To the President of the United States and to Sterling Carr, Esq., United States Attorney and to Kenneth C. Gillis, Assistant to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Patrick Kissane et al., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of the within citation on writ of error is hereby admitted this 20th day of January, 1925.

STERLING CARR,
United States Attorney. [578]

[Endorsed]: No. 15,708—Cr. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. Patrick Kissane et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [579]

[Endorsed]: No. 4523. United States Circuit Court of Appeals for the Ninth Circuit. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Joseph Gorham, Plaintiff in Error, vs. United States of America, Defendant in Error. Patrick Kissane, Plaintiff in Error, vs. United States of America, Defendant in Error. Tran-

script of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed March 12, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH E. MARRON, PATRICK KISSANE, et al.,

Defendants.

AMENDMENT TO ENGROSSED BILL OF EXCEPTIONS.

Through inadvertence and excusable neglect, the following portion of the proceedings had in the trial of the above-entitled cause, on the 14th day of January, 1925, being omitted from the engrossed bill of exceptions, allowed and settled heretofore by the Judge of the above-entitled court, pursuant to stipulation of the parties hereto:

On the 14th day of January, 1925, at the conclusion of the charge of said Court and prior to the submission of the cause to the jury, and in the presence of the jury, defendant Patrick Kissane addressed the Court as follows:

Mr. TAAFFE.—"On behalf of defendant Kissane, if your Honor please, I respectfully take an exception to that portion of your Honor's charge with reference to passive acquiescence and the duties of police officers."

. . . "Now that statute passed by the State of California, to say nothing of the Statute of the United States places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and, where he finds that persons are transgressing it to see that they are arrested and prosecuted in accordance with that Statute and the Statute of our Congress. In considering therefore the case of these two police officers, you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest, if they found any person transgressing it. I do not mean that you are to keep this distinction in mind that any man can be found guilty of conspiracy merely because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigating by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or mere shutting of a man's eyes to a violation of the law would not constitute him a conspirator; . . . Mere negligence or even shutting a man's eyes to a violation of the law would not constitute him a conspirator;

but, if, on the other hand, he knew that the law was being violated and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation or not. You are to determine, therefore, Gentlemen, from all the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy." . . . "If you find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise for those two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of that place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, Gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things—first,

that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in the regular course of business as showing as a part of the expenses the payment of money to these officers; and, third, if you find that there was any tacit, or other understanding that the place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of Gorham or Kissane or either of them."

The above proposed amendment to the engrossed bill of exceptions heretofore filed herein contains all of the instructions given and excepted to, requested and refused, and exception to the refusal thereof noted, in so far as defendant and plaintiff in error Patrick Kissane is concerned, and all the proceedings thereon relating to the trial, judgment, and conviction and sentence in the above-entitled cause, omitted from said engrossed bill of exceptions.

WHEREFORE, said defendant and plaintiff in error prays that the same may be settled, allowed and approved as an amendment to the engrossed bill of exceptions filed herein, to be used on appeal from the judgment herein.

Dated: May 6th, 1925.

JOS. L. TAAFFE,
Attorney for Patrick Kissane.

IT IS ORDERED that the foregoing amendment to the bill of exceptions heretofore filed herein is correct in all respects, and is hereby allowed, ap-

proved and settled, and may be made a part of the record herein.

Dated: May 6th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

No. 15,708.

UNITED STATES OF AMERICA,
vs.
JOSEPH E. MARRON, PATRICK KISSANE, et al.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I, Walter B. Maling, clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original amendment to bill of exceptions in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of May, A. D. 1925.

[Seal] WATER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy Clerk.

Receipt of a copy of the within amendment to engrossed bill of exceptions and order of District Judge acknowledged this 6th day of May, 1925.

STERLING CARR,
United States Attorney.
By THOMAS J. SHERIDAN,
Asst. United States Attorney.

[Endorsed]: Filed May 6, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 15,708. In the Southern Division of the District Court of the United States for the Northern District of California, —— Division. United States of America, Plaintiff, vs. Joseph E. Marron, Patrick Kissane, et al., Defendants. Certified Copy of Amendment to Engrossed Bill of Exceptions.

No. 4523. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 7, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.